Supreme Court, U. S.
FILED
JUN 20 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1980

No. 79-2018

PETER L. MAROULIS,

Petitioner,

v.

COUNTY COURT OF THE COUNTY OF DUTCHESS and HONORABLE ALBERT M. ROSENBLATT, Individually and as a Judge of the Dutchess County Court,

Respondents.

Motion for Leave to File Petition for Writ of Prohibition, Petition for Writ of Prohibition and Brief in Support Thereof.

PETER L. MAROULIS, *Pro Se*
104 Hooker Avenue
Poughkeepsie, N. Y. 12601
(914) 471-6050

Table of Contents.

Page

Motion for Leave to File Petition for Writ of Prohibition..... 1

Petition for Writ of Prohibition to the County Court of the County of Dutchess, State of New York, and the Honorable Albert M. Rosenblatt, Individually as a Judge of the Dutchess County Court..... 2

Opinion Below..... 3

Jurisdiction to Review..... 3

Questions Presented..... 3

Statutory Provisions Involved..... 4

Constitutional Provisions Involved..... 5

Statement of the Case..... 6

Reasons for Granting the Writ..... 13

1. A trial of the defendant on an indictment based upon evidence obtained in violation of the attorney-client privilege and evidence resulting therefrom, violates defendant's rights under the provisions of the Sixth Amendment to the United States Constitution..... 13

Page

2. The defendant should not be required to forfeit his First and Fifth Amendment rights (by revealing his mental condition on an insanity defense) because pre-trial review of his Sixth Amendment claims has been denied, when an acquittal by reason of insanity would deprive defendant of any means of obtaining review of the violation of his Sixth Amendment rights..... 15

APPENDIX.

Revised Decision of Hon. Albert M. Rosenblatt, J.C.C., Dated February 13, 1980..... 1a

Amended Decision of Appellate Division, Dated May 5, 1980..... 32a

Order of Appellate Division, Dated May 5, 1980... 34a

Decision of the Court of Appeals, Dated June 5, 1980..... 36a

Indictment..... 37a

Statement of Enid Schwartz, Dated August 20, 1979 38a

Statement of Enid Schwartz, Dated August 21, 1979 43a

Statement of Wallace L. Schwartz, Dated August 20, 1979..... 49a

Affidavit of Wallace L. Schwartz, Sworn to August 25, 1979..... 56a

Page

Affidavit of Albert Fentress, Sworn to September 18, 1979..... 59a

Stipulation, Dated January 25, 1980..... 62a

Notice of Defense, Dated June 5, 1980..... 64a

Stipulation as to Defense, Dated June 5, 1980..... 66a

TABLE OF CASES.

Black v. United States, 385 U. S. 26 (1966)..... 14

Griswold v. Connecticut, 381 U. S. 479 (1965)..... 15

O'Brien v. United States, 386 U. S. 345 (1967)..... 14

People v. Edney, 39 N. Y. 2d 620 (1976)..... 15

Roe v. Wade, 410 U. S. 113 (1973)..... 15

Simmons v. United States, 390 U. S. 372 (1968).... 16

Stanley v. Georgia, 394 U. S. 557 (1973)..... 15

OTHER AUTHORITIES.

New York C.P.L.R. Section 4503(a)..... 4, 14

Title 28, U. S. C., Section 1651(a)..... 4

Page

United States Constitution:

First Amendment..... 5, 15, 16
Fifth Amendment..... 5, 15, 16
Sixth Amendment..... 5, 13, 14, 15, 16
Fourteenth Amendment..... 5, 14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

No._____

PETER L. MAROULIS,

Petitioner

v.

COUNTY COURT OF THE COUNTY OF DUTCHESS and HON. ALBERT M. ROSENBLATT, Individually and as a Judge of the Dutchess County Court,

Respondents.

Motion for Leave to File Petition for Writ of Prohibition.

The petitioner moves the Court for leave to file the petition for a writ of prohibition hereto annexed; and further moves that an order and rule be entered and issue directing the Honorable County Court of the County of Dutchess, State of New York, and the Honorable Albert M. Rosenblatt, Individually and as a Judge of the Dutchess County Court, to show cause why a writ of prohibition should not be issued against them in accordance wth the prayer of said petition, and why your petitioner should not have such other and further relief in the premises as may be just and meet.

PETER L. MAROULIS, *pro se*
104 Hooker Avenue
Poughkeepsie, N. Y. 12601
Tel. (914) 471-6050

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

No._____

PETER L. MAROULIS,

Petitioner,

v.

COUNTY COURT OF THE COUNTY OF DUTCHESS and HONORABLE ALBERT M. ROSENBLATT, Individually and as a Judge of the Dutchess County Court,

Respondents.

Petition for a Writ of Prohibition to the County Court of the County of Dutchess, State of New York, and the Honorable Albert M. Rosenblatt, Individually and as a Judge of the Dutchess County Court.

The petitioner prays that a writ of prohibition be issued to review an order entered on May 5, 1980, by the Appellate Division of the State of New York, Second Department, dismissing a petition seeking to prohibit respondents from proceeding in excess of their jurisdiction or to require respondents to dismiss the indictment against the defendant, Albert Fentress.

Opinion Below.

No opinion was delivered by the Appellate Division, Second Department. The opinion of the Dutchess County Court is set forth in the Appendix at pages 1a to 31a.

Jurisdiction to Review.

The date of the order of the Appellate Division sought to be reviewed is May 5, 1980 (App. 34a-35a).* The Court of Appeals of the State of New York, on June 5, 1980, denied petitioner's application for permission to appeal (App. 36a).

The juridsiction of this court is invoked under Section 1651 (a) of Title 28, United States Code.

The special and unusual circumstances which warrant exercise by this court of its discretionary power to issue the writ of prohibition, as requested in this petition, are set forth later under the heading "Reasons for Granting the Writ."

Questions Presented.

1. Can a Grand Jury indictment be based upon evidence obtained in violation of the attorney-client privilege and evidence resulting therefrom, without running afoul of the provisions of the sixth amendment of the United States Constitution?

---

*(App.), refers to Appendix to Petition.

(S.tr.), refers to the stenographic transcript of the Nov. 21, 1979 hearing in the Dutchess County Court.

(S.tr.[a]), refers to the stenographic transcript of the Nov. 27, 1979 hearing in the Dutchess County Court.

2. Should the defendant be required to forfeit his first and fifth amendment rights (by revealing his mental condition on an insanity defense) because pre-trial review of his sixth amendment claims has been denied, when an acquittal by reason of insanity would deprive defendant of any means of obtaining review of the violation of his sixth amendment rights?

3. Should the defendant be required to choose between fundamental rights—effective assistance of counsel and attorney-client privilege vs. privacy, due process, and privilege against self-incrimination?

Statutory Provisions Involved.

United States Code, Title 28:

§1651(a). WRITS

> The Supreme Court and all courts established by act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

§4503 (a) *N. Y. Civil Practice Laws and Rules*

> (a) Confidential communication privileged; non-judicial proceedings. Unless the client waives the privilege, an attorney or his employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on

behalf of any state, municipal or local government agency or by the legislature or any committee or body thereof. Evidence of any such communication obtained by any such person, and evidence resulting therefrom, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof . . . .

Constitutional Provisions Involved.

United States Constitution, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Fifth Amendment:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . .

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

United States Constitution, Fourteenth Amendment:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

Statement of the Case.

Shortly after 2:00 A.M. on August 20, 1979, Wallace L. Schwartz, an attorney residing in Hartsdale, New York, received a telephone call from Albert F. Fentress, who was urgently seeking advice[1] (App. 38a, 49a, 56a, 59a). Fentress was calling from his home in Poughkeepsie, New York.

Fentress told Schwartz that he was going to kill himself. He said he had killed somebody. Schwartz stated that the police should be called, but Fentress did not agree. Fentress wanted to "square this with God" (S.tr. 97, App. 51a, 56a, 57a). He explained that a sex crime was involved and mentioned a mutilation.

Schwartz invited Fentress to come to his house in Hartsdale, which is an hour and fifteen minutes drive from Poughkeepsie, but Fentress refused because it was too far. Schwartz asked Fentress if he wanted someone else to come over. A discussion ensued regarding whom Fentress wanted to come to his house. He raised the name of a "local Rabbi" whom he wished to see (S.tr. 99, App. 43a, 44a, 51a, 57a).

Schwartz suggested that he would call the Rabbi for Fentress and asked Fentress if, after the Rabbi went to his house on South Grand Avenue, Fentress would wait there for Schwartz. Fentress said he would leave his door open for the Rabbi and would wait for Schwartz with the Rabbi. Fentress stated that the police should not be called until after Schwartz arrived at the Fentress house (S.tr. 99, 106, 129, 163, 165, 181, App. 49a, 57a). Schwartz said that he would call the Rabbi (S.tr. 108, App. 51a, 57a) and the telephone conversation, which lasted about thirty (30) minutes, terminated.

---

[1]Schwartz had told Fentress to feel free to call him at any time, day or night, if he had a problem (S.tr. 176, App. 54a-55a, 57a). In fact, Fentress had called Schwartz on one or two prior occasions for legal advice (S.tr. 92).

Schwartz, a real estate lawyer, did not tell Fentress that he would not represent him in a criminal matter (S.tr. 176, App. 54a, 58a). After the telephone conversation, Schwartz recognized that he had a responsibility to safeguard the secrets Fentress was imparting and that the conversation "could be construed as one between an attorney and his client, that that information was privileged information." He himself considered the information privileged (S.tr. 176). Schwartz stated that he gave Fentress legal advice (S.tr. 179, App. 57a).

At approximately 2:40 A.M., after hanging up, Schwartz telephoned his parents who reside in Poughkeepsie, New York, and spoke with his mother, Enid Schwartz (Mrs. Schwartz is not an attorney). He told his mother that he had spoken with Fentress and that something serious had happened (S.tr. 111, App. 38a, 52a, 57a). Schwartz said that Fentress had stated he had killed someone and was going to kill himself. Fentress had asked to see Rabbi Zimet. Schwartz enlisted his mother's assistance in contacting the Rabbi (S.tr. 111, App. 38a, 52a, 57a), but first, it was agreed that Enid should call Fentress to ascertain that a problem really existed (S.tr. 112, App. 38a, 43a, 52a, 58a). Schwartz suggested that his mother should call the Rabbi because he probably did not know Schwartz, but the Rabbi knew and trusted Enid (S.tr. 116, App. 39a, 52a, 57a). After agreeing to call Fentress to verify that a real problem existed, and then to call the Rabbi, Enid Schwartz hung up.

Enid Schwartz then called Fentress at approximately 2:45 A.M. She said that her son had called and related the substance of Fentress's conversation with Schwartz (App. 38a, 43a, 60a). Fentress told her that there had been a killing or shooting (S.tr. 22, App. 38a, 43a). She agreed to Fentress's request that she call Rabbi Zimet for him. She also said that she thought the police should be called, but Fentress stated that he wanted to talk to the Rabbi (S.tr. 22-23, App. 38a, 43a).

Enid Schwartz made two unsuccessful attempts to reach Rabbi Zimet (S.tr. 25, App. 39a, 43a). Enid was afraid to call Fentress back to relate she could not reach the Rabbi (S.tr. 25-26, App. 39a, 43a). She discussed calling the police with her husband, and then phoned her son to tell him her decision that the police should be notified. He concurred (S.tr. 29, App. 39a, 43a, 53a, 58a). This second conversation between Enid Schwartz and her son occurred around 3:00 A.M. (S.tr. 123, App. 39a, 52a-53a, 58a). Enid reported that she had failed to reach the Rabbi. She verified to Wallace that a serious problem existed (S.tr. 126, App. 39a, 52a, 58a). The subject of calling the police was discussed. Schwartz told his mother to call the police. He said:

> I think that there may be an attorney-client problem here; and that in what you relate to the police you should indicate that Al Fentress is contemplating suicide, that something very serious has happened there, and you should indicate that somebody has been killed in the house (S.tr. 126-127).

Schwartz also said he thought his father should accompany the police so that Fentress would not harm himself. Schwartz did not notify Fentress that the police were going to be called (S.tr. 183, App. 53a, 61a).

Enid Schwartz called the police station at 3:05 A.M. and talked with Officer Ghee. She reported that her son, a Westchester County resident, had received a call from Fentress who had said that he had killed someone at his home on Grand Avenue (S.tr.[a] 6, App. 39a, 46a). She said that Fentress had requested that she call a Rabbi for him. She believed that, after her conversation with Fentress, what he told her was true. She advised the police not to use sirens because Fentress had a gun collection and she

did not want any harm to come to the police (S.tr. 35, App. 39a, 46a). She said that she and her husband wanted to go to the Fentress house but Ghee advised them to remain at home (S.tr.[a] 19, App. 39a-40a, 44a).

After this conversation, Enid Schwartz called her son around 3:08 A.M. to report that she had notified the police and they would call her back when Fentress was in custody. Schwartz said he would wait for a phone call from his mother after she had heard from the police (S.tr. 134, App. 53a, 58a).

At 3:10 A.M., Officer Ghee, after his conversation with Enid Schwartz, dispatched Officers Perkins, Holden, Ross and Mattushik to the Fentress home (S.tr.[a] 11, App. 60a, 62a). The police came up the lawn of the defendant with one officer going to the back door. Another officer, who could see Fentress sitting near his living room window, approached the window, covered the defendant with his police revolver and announced to the other officers that he had Fentress covered (App. 60a-61a, 63a). After Officers Perkins, Holden and Ross had entered Fentress's house, Officer Perkins read Fentress his rights at 3:19 A.M. (S.tr.[a] 43). Fentress told Officer Ross that he had been in contact with his attorney by telephone and that his attorney would be arriving shortly (S.tr.[a] 78-79). Fentress said that "he did not want to answer any questions without his attorney present" (S.tr.[a] 47). He said he was waiting for his attorney who was coming from Hartsdale in approximately 45 minutes (S.tr.[a] 54-55, 63, 78).

Enroute to the police station at about 3:19 A.M., Fentress told Officer Holden that the name of his attorney was Wallace Schwartz, the attorney from Hartsdale Fentress had mentioned (S.tr.[a] 64-65). Fentress was then taken into custody and Enid Schwartz was notified of that fact by the police (S.tr. 38, App. 40a, 53a, 58a).

At 3:26 A.M., Enid Schwartz made a third phone call to her son, Wallace, to report that the police had taken Fentress into custody. The police had told her a body had been found in the Fentress home (S.tr. 135, App. 40a, 53a). Schwartz said he would be coming to Poughkeepsie in approximately one and one half hours. He phoned his mother at 3:50 A.M. to tell her he was leaving. Enid Schwartz told him that the police would be getting in touch with her later (S.tr. 137, App. 40a, 53a).

Shortly after 4:00 A.M., Officer Ghee telephoned Enid Schwartz to tell her that the detective division wanted to talk to her and asked if she would stay at home so that they could contact her (S.tr.[a] 13, App. 40a).

At the police station, from approximately 3:40 A.M. until 6:00 A.M., Fentress referred to his attorney, Mr. Schwartz, several times (S.tr.[a] 66, App. 61a). He was "anxiously awaiting" his attorney's arrival and was surprised that his lawyer had not arrived at police headquarters in that the drive from Hartsdale was about an hour (S.tr.[a] 84). Concerned that Wallace Schwartz might go to the Fentress home, he asked that the police stationed there tell Schwartz to go to the police station (S.tr.[a] 67, 84). He repeatedly asked Holden to check to see if Schwartz had arrived at the South Grand Avenue house (S.tr.[a] 66).

Fentress was turned over to Detective Siegel, who spoke with Fentress about 4:15 A.M. (S.tr.[a] 89). Fentress said he did not want to make a statement and that he was awaiting the arrival of his attorney, Wallace Schwartz (S.tr.[a] 92). After Fentress had requested that Detective Siegel call his attorney, Detective Siegel called Enid Schwartz's home shortly after 5:00 A.M. Mrs. Schwarz said her son was en route from Westchester and should arrive in Poughkeepsie around 5:30 (S.tr.[a] 93, App. 41a).

Wallace Schwartz arrived in Poughkeepsie around 5:08 A.M. and went to his parents' home (S.tr. 137, App. 41a, 53a, 58a). After Schwartz had called his wife to report that he had arrived safely, his parents indicated that the police had called and that Fentress had been asking to see him as his attorney (S.tr. 54, App. 41a, 54a, 58a). Schwartz was to call the police and ask for a certain officer. He quickly discussed with his parents the fact that a criminal attorney should be called in on the case (S.tr. 139, App. 45a, 58a). Schwartz had decided that Peter L. Maroulis should be contacted (S.tr. 139, 141, App. 45a, 54a, 58a, 61a).

Schwartz telephoned the police between 5:10 A.M. and 5:25 A.M. (S.tr. 138, S.tr.[a] 96, App. 53a, 58a) and talked with Detective Siegel. Fentress had asked for Schwartz to go to the police station and appear as his attorney (S.tr. 139, App. 41a, 54a, 58a). Schwartz said that he did not feel that he could defend Fentress because he was not a criminal lawyer (S.tr.[a] 102, App. 54a, 58a). He did not say straight out that he would not represent Fentress, but rather said he did not feel that he could (S.tr.[a] 106, App. 54a). He stated that Fentress's rights would not be protected and that someone else should be called (S.tr. 139, App. 54a).

Detective Siegel turned away from the phone and asked Fentress if there was another lawyer he wanted to use, since Schwartz had just stated he did not feel he could represent Fentress (S.tr.[a] 102, 103, App. 54a). Fentress mentioned Peter L. Maroulis and Schwartz who had previously decided to recommend Maroulis, concurred and agreed to call Maroulis (S.tr. 139, App. 54a).

Fentress had asked that Peter Maroulis be contacted before the Siegel-Schwartz telephone conversation. While he was waiting for Schwartz at the police station, he was asked questions by the police on several occasions, even though Fentress had informed them that he was waiting

for his attorney, Wallace Schwartz. He finally asked the police to call Peter Maroulis but was told that his lawyer was coming (App. 61a).

At approximately 5:25 A.M., Schwartz called Maroulis and briefly explained the situation. Maroulis advised that the conversation be terminated so that he could call the police (S.tr. 142, App. 54a). In his 5:30 A.M. phone call to police headquarters, Maroulis told Detective Siegel to make a blotter entry of the call (S.tr.[a] 96). Siegel was instructed that the police were not to talk to the defendant, Albert Fentress (S.tr.[a] 104).

Maroulis then called Schwartz; discussed the situation; recommended that Schwartz and his parents should make notes on what had happened; and made arrangements with Schwartz to go together to the police station (S.tr. 142, App. 54a, 58a). Schwartz picked Maroulis up at his office at approximately 5:40 A.M. to 5:45 A.M. and they proceeded to the police station (App. 54a, 58a).

At 6:10 A.M., two attorneys, Schwartz and Maroulis, arrived to talk with Fentress (S.tr. 159, S.tr.[a] 97, App. 54a, 58a). They interviewed the defendant for approximately sixty (60) to ninety (90) minutes. A tape recording device was used (S.tr. 144). Schwartz was present when Fentress was fingerprinted and was present at the arraignment with Maroulis (S.tr. 144, App. 58a).

At 1:29 P.M. on August 20, Schwartz went to the jail to see Fentress and informed the defendant that Schwartz would no longer be representing him in criminal matters (App. 58a). Schwartz subsequently represented Fentress in a civil matter, the sale of his house (S.tr. 146).

Reasons for Granting the Writ.

1. A trial of the defendant on an indictment based upon evidence obtained in violation of the attorney-client privilege and evidence resulting therefrom, violates defendant's rights under the provisions of the Sixth Amendment to the United States Constitution.

On August 21, 1979, Indictment #168/79 was returned by the Grand Jury of Dutchess County (App. 37a). In that indictment my client, Albert Fentress, is charged with one (1) count of Murder in the Second Degree, a Class A-1 Felony, in violation of Section 125.25 of the Penal Law of the State of New York. The indictment alleges as follows:

> The said defendant, in the City of Poughkeepsie, County of Dutchess and State of New York, on or about the 20th day of August, 1979, with intent to cause the death of another person, caused the death of Paul Masters by shooting him in the head with a firearm.

By Motion dated September 18, 1979, Albert Fentress moved for dismissal of the indictment and asserted the violation of his attorney-client and Sixth Amendment rights under the United States Constitution. The court ordered that a hearing be held. That hearing was held on November 21st and 27th, 1979. By Decision dated February 13, 1980 (App. 1a-31a), Honorable Albert M. Rosenblatt, Dutchess County Judge, denied the Motion to Dismiss. In that Decision, Judge Rosenblatt conceded that an attorney-client relationship existed between Mr. Fentress and Attorney Schwartz, but concluded that the attorney-client privilege was waived by Mr. Fentress by reason of his conversation with Enid Schwartz. Judge Rosenblatt found that Enid Schwartz was not the agent of Wallace Schwartz.

The attorney-client privilege is codified in New York in §4503 C.P.L.R. Judge Rosenblatt ignored that portion of the provisions of C.P.L.R. §4503 which reads, "Evidence of any such communication obtained by any such person and evidence resulting therefrom, shall not be disclosed . . ."; and also ignored Mr. Fentress's Sixth Amendment rights to the assistance of counsel (*Black v. United States,* 385 U.S. 26 [1966]; *O'Brien v. United States,* 386 U.S. 345 [1967]); and his Fourteenth Amendment rights of due process and equal protection of laws.

The petition should also be granted in the interest of justice. Public policy requires that a defendant be free to communicate openly and candidly with his attorney and the agents or employees of his attorney, without fear of disclosure of these communications. This entire case is based upon evidence derived in violation of this fundamental principle, and requires dismissal to buttress these safe-guards which are sacred to our system of justice.

2. The defendant should not be required to forfeit his First and Fifth Amendment rights (by revealing his mental condition on an insanity defense) because pre-trial review of his Sixth Amendment claims has been denied, when an acquittal by reason of insanity would deprive defendant of any means of obtaining review of the violation of his Sixth Amendment rights.

Albert Fentress will suffer irreparable injury if he is forced into a trial on an indictment which is based upon evidence obtained in disregard of the attorney-client privilege and his Sixth Amendment rights. This constitutional issue should be decided prior to trial because if it is not decided prior to trial, Fentress will be forced to forfeit other constitutional rights. Fentress has served a notice (App. 64a-65a) that he will rely on a defense of insanity. Such a notice opens defendant's medical files to the prosecution (*People v. Edney,* 39 N. Y. 2d 620 [1976]) and effectively requires him to forfeit his First[2] and Fifth Amendment rights in order to present a defense of insanity.[3] If defendant prevails on his defense of insanity, the substantial violation of his Sixth Amendment rights will go without redress because, the defendant will not have recourse to review on appeal. On the other hand, if the defendant's Sixth Amendment rights are not safeguarded

---

[2]*Roe v. Wade,* 410 U.S. 113 (1973);
Stanley v. Georgia, 394 U.S. 557 (1969);
Griswold v. Connecticut, 381 U.S.479 (1965).

[3]Defendant has waived no rights by filing a notice of insanity defense. By stipulation between attorneys (App. 66a-67a), it was agreed that pending the final determination of the prohibition proceeding, all material received by the District Attorney regarding the defense of mental disease or defect, would be held by him under the seal of the court. It was also agreed that if prohibition were granted, the prosecution would be barred from ever disclosing the contents of such material.

pre-trial, then he will be required to forfeit his First and Fifth Amendment rights. Such action would be contrary to the Decision of the United States Supreme Court in *Simmons v. United States* (390 U.S. 372 [1968]). Fentress should not be required to forfeit one constitutional right in order to exercise another.

Petitioner contends that the courts below erred in refusing to dismiss Albert Fentress's indictment which is based upon evidence obtained in violation of the Sixth Amendment and the attorney-client privilege. A trial based upon this indictment would violate Fentress's constitutional rights in a manner not remediable through the ordinary course of appeal. The ruling of the Appellate Division (in refusing to grant prohibition, and therefore allowing the determination of the Dutchess County Court to control) is one which this court can and should correct by writ of prohibition.

WHEREFORE, petitioner prays:

1. That a writ of prohibition issue from this court directed to the County Court of the County of Dutchess and Honorable Albert M. Rosenblatt, Judge of the said court, requiring said Honorable Albert M. Rosenblatt, to show cause on a day to be fixed by this court why they should not be prohibited from proceeding to try Albert Fentress under Indictment #168/79.

2. That petitioner have such additional relief and process as may be necessary and appropriate in the premises.

Dated: Poughkeepsie, N. Y.,
June 20, 1980.

Respectfully submitted,

PETER L. MAROULIS, *pro se,*
104 Hooker Avenue,
Poughkeepsie, N. Y. 12601
Tel. (914) 471-6050.

APPENDIX.

Revised Decision of Hon. Albert M. Rosenblatt, J.C.C., Dated February 13, 1980.

Present: Hon. Albert M. Rosenblatt, Judge.

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

against

ALBERT FENTRESS,

Defendant.

Indictment #168/79.

John R. King, Esq., Dutchess County District Attorney (Thomas J. Dolan, Esq., of Counsel for Plaintiff).

Peter L. Maroulis, Esq., Attorney for Defendant.

ROSENBLATT, J.:

What are the statutory and ethical obligations of an attorney who receives a telephone call from a friend who states that he has just killed someone and is about to take his own life? May the divulgence, under any circumstances, be disclosed, and if so, to whom, and with what consequences? The defendant argues that attorney-client confidentiality in this instance is absolute, and that any disclosure which, directly or indirectly, leads to a

discovery of the body and evidence, mandates dismissal of an indictment. In some respects the issues presented here are reminiscent of *People v. Belge,* 83 Misc. 2d 186, aff'd 50 A. D. 2d 1088, aff'd 41 N. Y. 2d 60. This case involves the converse, with additional factual disputes regarding waiver, and the existence of the attorney-client relationship itself.

The defendant stands indicted for intentional murder (Penal Law 125.25[1]). While the facts adduced before the grand jury are sufficient to establish the crime, the defendant avers that the indictment must be dismissed because it is the product of tainted and inadmissible evidence, presented in violation of the attorney-client privilege, as codified in CPLR 4503. In essence, he contends that his then attorney, Wallace Schwartz, in whom he claims to have confided in a professional capacity, divulged the facts which led to his arrest, indictment, and the discovery of the body, as well as other evidence.

The attorneys for both sides have asserted that the case is unprecedented in American legal annals. This Court's research has not uncovered any opinion involving the confluence of an alleged breach of confidence by one's own attorney and the applicability of an exclusionary statute as a proposed remedy.

The defendant asserts that he contacted Wallace Schwartz, and in quest of legal advice, confided to him the facts regarding the event, and that the attorney called his own mother, who, in turn, called the defendant and then the police, as a result of which the defendant was arrested, and the body of the victim discovered in his home. He maintains that the disclosures were unauthorized, that the evidence presented to the grand jury flowed from the breach of confidentiality which he never waived, and that CPLR 4503 precludes the use, directly or derivatively, of any evidence obtained in violation of the attorney-client privilege. In short, he contends that the alleged breach of confidentiality immunizes him from criminal responsibility.

The district attorney, in opposing the motion, contends that no attorney-client relationship was ever created, and that even if it was, the defendant, by his own actions, waived its confidentiality.

The case presents issues at the root of the attorney-client relationship, the professional duty of confidentiality, the concept of waiver, the statutory prohibitions, and the vexing ethical and moral dilemmas which marked the episode itself.

CPLR Section 4503 reads as follows:

> §4503. Attorney
>
> (a) Confidential communication privileged; non-judicial proceedings. Unless the client waives the privilege, an attorney or his employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his employee and the client in the course of professional employment, shall not disclose or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local govermental agency or by the legislature or any committee or body thereof. Evidence of any such communication obtained by any such person, *and evidence resulting therefrom* shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof
> * * *

Upon the underscored language, the defendant bases his contention that the indictment rests on proof "resulting" from the breach, but for which there would have been no

arrest, discovery of evidence, or indictment. CPLR Section 4503, by virtue of CPL Section 60.10, is made applicable to criminal actions (*People v. Hitchman*, 70 A. D. 2d 695).

If the proof presented to the grand jury was derived from what defendant avers to be a fractured professional confidence, it cannot, he urges, be counted as competent legal proof to justify indictment (CPL 190.65). Hence, the argument goes, the indictment must be dismissed because the grand jury had no legally admissible evidence before it on which to return a valid accusation (CPL 210.20; 210.25; 210.30).

Because the motion is addressed to the sufficiency of *legal* proof before the grand jury, it has been necessary to hear witnesses (CPL 210.45[6]), in order to factually determine whether an attorney-client relationship was born, whether the utterances were made within its lifetime and parameters, and if so, whether a seal of contemplated secrecy was broken by Wallace Schwartz, or by the defendant's own acts, thereby constituting a waiver.

I

THE HEARING

The defendant's present attorney, Peter L. Maroulis, is correctly cognizant of his burden of proof to demonstrate the insufficiency of the grand jury proof upon a motion to dismiss (CPL 210.45[7]; *People v. Scroggins*, 56 A. D. 2d 856), as well as his task of establishing the existence of a privileged relationship (*Rosseau v. Bleau*, 131 N. Y. 177, 183; *Bankers' Money Order Assoc. v. Nachod*, 120 App. Div. 732, 733), the facts to justify its recognition by the Court (*Bloodgood v. Lynch*, 293 N. Y. 308, 314; *Randy International Ltd. v. Automatic Compactor Corp.*, 97 Misc. 2d 977, 981), and the existence of the pre-requisites for its operability (Fisch on New York Evidence, Sec. 22, 418; *People v. Doe*, 99 Misc. 2d 411).

At the outset, he expressed grave concern about negotiating the mine field through which he could present proof of an alleged breach by the former attorney, Wallace Schwartz, without waiving the very confidentiality of the communications themselves. The paradox involves the proposed introduction of proof of an allegedly confidential consultation, in order to establish its ensuing and allegedly unauthorized disclosure by Wallace Schwartz, as against the risk that its presentation in Court would, by waiver, pave the way for its use at a trial of the indictment in the event the dismissal motion fails.

As a general rule, a defendant in the exercise of one right, may not be compelled to forego another (*Simmons v. United States,* 390 U. S. 377, 394). The waiver doctrine has been invoked when the defendant directly or through his witness exposes the confidences (*People v. Bloom,* 193 N. Y. 1; Richardson on Evidence, 10th Ed., Sec. 438). To resolve the quandary both sides expressly consented to a prohibition against any use by the prosecution, on its case-in-chief at trial, of any allegedly confidential statements adduced at the hearing. In that manner, the defendant would surrender nothing in the exercise of his right (and burden) to attempt to prove the violation of CPLR 4503, while the People would be permitted, at the trial, to use testimony adduced at the hearing, for impeachment or rebuttal purposes only, analogous to the rule in *Harris v. New York,* 401 U. S. 222. The format is comparable to the security afforded a defendant who may testify at a *Huntley* hearing without risking cross examination on the merits and the introduction of that testimony offered against him at the trial (*People v. Lacy,* 25 A. D. 2d 788).

With the guidelines thus set, the defendant, apprehensive about baring the existence of incriminating statements which he made to Wallace Schwartz, moved that the hearing be closed. The Court, in its discretion, denied the motion. Despite the existence of publicity, the Court did not, on balance, believe closure to be imperative to a fair trial

under these circumstances. Largely for the reasons expressed in *People v. Williams,* 97 Misc. 2d 24 and *People v. Putland,* —Misc. 2d—, and now supported by the authority of *Mtr. of Westchester Rockland Newspapers, Inc. v. Leggett,* 48 N. Y. 2d 430 (cf. *Mtr. of Hearst Corp. v. Clyne,* 71 A. D. 2d 966), the Court allowed the public and press to attend the hearing. It was also agreed that the hearing, because of its threshold nature, would involve the attorney-client issue only, and that other constitutional and legal matters would be dealt with later, if need be.*

FINDINGS OF FACT

Albert Fentress was a schoolteacher in the City of Poughkeepsie School System.

Among his colleagues there for more than a decade was Enid Schwartz, a fellow teacher and personal friend, whom Fentress visited at her home once or twice yearly. Her friendship with Fentress was substantial, and was based on his having taught two of her children, as well as on the independent basis of their relationships as colleagues over the years.

---

*The only other exotic procedural point at the hearing involved requests by the prosecution for *Damon* type material (24 N. Y. 2d 256) kept by defense witnesses who testified about the allegedly confidential communications. This discovery was opposed by the defense. Because the *Damon* court has cautioned about the possibly confidential nature of that evidence (24 N. Y. 2d 262, n.2), this court, upon defendant's consent, examined the material *in camera* (*People v. Poole,* 48 N. Y. 2d 144) and concluded that it was, by and large, duplicative of the hearing testimony. The prosecutor, sensitive to the pitfalls of forced disclosure (e.g., *People v. Marsh,* 59 A. D. 2d 623, mot for lv to app den 43 N. Y. 2d 798; *United States v. Brown,* 501 F. 2d 146; *United States v. Wright,* 489 F. 2d 1181) discreetly refrained from pressing his application for discovery, despite any arguable reliance on *United States v. Nobles,* 422 U.S. 225, which emasculates *Brown* and *Wright.* Ironically, the defense later offered all of this material into evidence, and the prosecutor objected. Because the material adds nothing to the testimony, the matter is academic.

One of these sons, Wallace, had been taught by Fentress in the ninth grade, and through the years had developed an independent personal friendship with him. After graduating, Wallace Schwartz and Fentress visited at each others homes and had engaged in sports together.

After Wallace graduated from law school, and joined a civil firm in New York City, he gave Fentress his card and told him that he could call him at any time. On August 20, 1979, the Court finds the following to have occurred:

2:12 a.m. Fentress, from his home at 216 Grand Avenue in Poughkeepsie, called Wallace Schwartz at the latter's home in Hartsdale, Westchester County. The first thing that Fentress said was that he was about to kill himself. Fentress spoke in a low monotone, and was distraught, but coherent. He told Schwartz that he had just killed someone, that a terrible thing had happened, which he could not square with God, and that he was going to kill himself.

Incredulous, Wallace Schwartz said it must have been an accident, but was told it was not, and that there had been a sexual mutilation as well.

In continuing attempts to dissuade his valued friend from suicide Wallace Schwartz told Fentress that suicide would not square anything with God, and that whatever had happened, Fentress could get help. Wallace Schwartz invited Fentress to his house, and offered to go to Fentress's house, but Fentress refused.

Wallace Schwartz then suggested various persons who might be able to call and stay with Fentress, all of whom were rejected. However, later in the conversation Fentress said he would like the local rabbi, Rabbi Zimet, to come to his house, and asked Wallace Schwartz to call the rabbi for him, which Wallace Schwartz agreed to do immediately. Fentress said he would leave the door open, and wait for the rabbi. It was also agreed that the police be summoned. (See Point IV, *infra*.)

Schwartz testified that it was his "legal" advice to Fentress that the police be called.

Wallace Schwartz believed that the police were to be called in not only as a legal and moral matter, but, principally, because he feared for defendant's life, in view of his condition and self-destructive intentions. In any event, he so counselled the defendant, saying that "we" or he (Fentress) would have to call the police. Fentress agreed, and stated that he would like to have both *Wallace Schwartz and the rabbi* present when the police arrived. (See Point IV, *infra.*)

The conversation lasted approximately thirty minutes, and consisted of much repetition, with Schwartz, understandably incredulous, endeavoring to determine whether the account could not have (hopefully) been a joke or a hallucination on Fentress's part.

At this point, of course, he did not have firsthand knowledge of the facts, but, recognizing the urgent need for immediate action (he could not fully conclude that any victim was actually dead) and because he was some fifty miles away, he immediately attempted to arrange to contact the rabbi.*

---

*It should be noted, at this point, that Fentress was not and is not Jewish. While there was some peripheral discussion at the hearing about the possible clergyman-penitent relationship, the court finds it lacking. Rabbi Zimet, as it turned out, could not be reached, and through no one's fault never appeared at defendant's house or spoke to the defendant. The only connection between the defendant and the rabbi is that they both were at Wallace Schwartz's wedding where, one may speculate, they may have met.

The facts, therefore, in no way resemble *People v. Bevilacqua,* 45 N. Y. 2d 508, in which the *police* frustrated the defendant's efforts to communicate with anyone who might provide him with advice or assistance. An expression of a wish or acquiescence for communication with a clergyman—here, of another faith—is not metamorphosized into a request for counsel (*People v. Byrne,* 47 N. Y. 2d 117, 123)

(Continued on next page.)

There was no discussion about what to do with any evidence, gun, or body, and no mention, by either Wallace Schwartz or Fentress, about contacting Enid Schwartz, Wallace's mother.

Wallace Schwartz was no longer close to Rabbi Zimet, since he had moved away, and felt that the call to the rabbi, considering its gravity as well as the hour, should be made by someone whom the rabbi knew and trusted. Therefore at

2:40 a.m. Wallace Schwartz called his mother, Enid Schwartz, who lived in Poughkeepsie, to enlist her aid in calling the rabbi and arranging for him to go to Fentress's house.

Wallace Schwartz told Enid of the call he had just received, and of his extreme anxiety about Fentress having said that there had been a killing, or that he had killed someone, and that he was going to kill himself, and wanted Rabbi Zimet to come to see him. The conversation was very brief, and Wallace Schwartz expressed shock and disbelief at what he had been told.

(Continued from previous page.)

because the thought here was articulated absent custody, quite before the entry of the police onto the scene, and directly to the person whom the defendant now claims was acting as his attorney.

Moreover, the defendant's wish to consult with Rabbi Zimet—a request which he repeated to Enid Schwartz at 2:40 a.m.—is further evidence of the absence of any intent on his part to keep secret the presence of the body. While he may have wished to speak to a clergyman with whom he had no relationship whatever, it cannot be presumed that he had any reason to expect the clergyman to conspire with him to obstruct governmental administration (Penal Law 195.05), hinder prosecution (Penal Law 205.50), conceal a body (a crime under Public Health Law Section 4143[1]), or to impede its prospective production (a felony under Penal Law Section 215.40[2]), particularly where he made it plain that he simply wanted to have the rabbi there *when the police arrived*. This articulated intention of the defendant itself projects a waiver of any strictures which could conceivably silence clergymen as to the discovery of evidence (CPLR 4505).

Enid, herself a close friend of Fentress, agreed to call the rabbi but said she was going to call Albert Fentress first to verify that there was a real problem there.

Although Wallace Schwartz did not attempt to discourage Enid's announced intention to call Fentress, and, indeed, concurred in it, the testimony is uncontradicted, and the Court finds that the decision to call Albert Fentress was solely Enid's.

2:45 a.m. As soon as Enid hung up, she called and asked Fentress *what had happened.* He told her either that he had killed someone, or that there had been a killing.

Notably, she never told Fentress that Wallace Schwartz had revealed to her any of the substance of the conversation between Fentress and Wallace Schwartz. The beginnings of the conversation of 2:45 a.m. between Enid and Fentress are, in this Court's view, critical, for reasons which follow:

The Court finds as a fact that when Enid telephoned Fentress she did not state or imply, nor could she have concluded, that Fentress had committed a crime. She knew, from Wallace, that Fentress may have killed *someone,* but she could not have concluded whether it was self-defense or the justifiable killing of an intruder, or willful murder. Her overriding concern was for the preservation of the life of her friend, Albert Fentress. When she began the conversation by asking Fentress what happened, Fentress stated that there had been a killing.

During the 2:45 a.m. conversation, Enid told Fentress that the police must be called, saying either "You must call the police" or "I am going to call the police." Fentress's response was that he would like Rabbi Zimet there waiting until the police came. She got the understanding that Albert Fentress acknowledged that it was proper for the police to come. (See Point V, *infra*).

Notably, Fentress did not state that he wanted his attorney there, only the rabbi. This is important, in that Fentress recognized that the presence of an attorney in the

case would not (or should not) stem the arrival of the police. The Court thus finds that Fentress agreed that the police be called, and further, that he did not attempt to place any condition, as to the presence of an attorney, on their being called. His wish for a rabbi, while understandable for purposes of spiritual comfort, has no legal implications whatever.

2:50 a.m. After Enid spoke to Fentress, she immediately called Rabbi Zimet but there was no answer. She tried again, with the same result.

While Fentress had asked her to let him know if she reached the rabbi, she was fearful that if she informed him of her failure, he might carry out his suicide threat.

It was because she could not reach the rabbi that she decided to call the police, to protect Fentress from harming himself.

2:59 a.m. Enid Schwartz called her son Wallace, to tell him of her unsuccessful attempts to reach the rabbi, and her intention to call the police. The Court finds that the decision to call the police was made by Enid alone, although Wallace Schwartz concurred in it, principally because they both wished to prevent the defendant's suicide. Because of Wallace Schwartz's concern for Fentress's (legal) position, he cautioned his mother to be discreet in what she told the police, and to limit her remarks to the effect that there may have been a shooting at Fentress's house, and that there was fear that Fentress might commit suicide.

3:05 a.m. Enid called the police and told Officer Thomas Ghee that she quite honestly could not be sure that there was anything amiss, that she profoundly hoped that they would find the entire episode to be nothing (e.g., a hallucination on Fentress's part), but that it was reported to her by her son, and then by Fentress, that there had been a shooting or killing at his home. She warned the police that because of Fentress's alleged suicidal intentions, it would be unwise to approach with sirens. She offered to accompany the police, in order to allay Fentress.

She told Ghee that she knew Fentress to have a gun collection. (This, apparently, from her own knowledge and extensive friendship with Fentress and the absence of any testimony by anyone that Wallace Schwartz told her of it.) The police declined her offer to accompany them, and they immediately drove to Fentress's home. After speaking with Enid, Officer Ghee did not have, and indeed could not be expected to have had, any clear idea about what had been happening at the Fentress house, or whether a culpable, criminal act had occurred.

3:08 a.m. Enid called Wallace and told him that she had contacted the police, telling them to go to Fentress's house, and that they would notify her as to Fentress's custodial state.

3:15 a.m. The police, dispatched by Sgt. Krauer, arrived at defendant's house. The lights were on and the door open. Fentress was seated next to an open window, and beckoned: "Officer, please come in and take the gun."

3:19 a.m. The defendant was given his *Miranda* warnings, according to Officer Perkins.* The defendant declined to speak, stating that he was "waiting for his attorney," whom "he had already contacted," and whom he was expecting shortly. The police desisted questioning.

3:26 a.m. The police telephoned Enid and told her that Fentress was in custody, and she telephoned Wallace Schwartz to tell him so.

3:30 a.m. Fentress was driven to the police station, and told the police that his attorney was Wallace Schwartz. After arriving at the police station, Fentress, on three or four occasions, asked for "his attorney, Wallace Schwartz." The police agreed to direct Wallace Schwartz to the police department, in the event he was to go to the Fentress's home.

---

*All parties recognize that this was not a *Huntley* hearing. Those issues will be adjudicated at a later date. The Court mentions *Miranda* only because the defendant's answer is germane to this hearing.

3:50 a.m. Wallace Schwartz set out for Poughkeepsie.

4:15 a.m. Ira Siegel, the first detective to see the defendant, arrived at police headquarters and immediately began to interview Fentress, who stated that he was waiting for his attorney, Wallace Schwartz. Siegel desisted.

Sometime between 4:30 a.m. and 5:09 a.m. The police telephoned Enid Schwartz and stated that Fentress had asked for Wallace Schwartz, who was to call the police, should he happen to go to her house first. (The police had already alerted officers at the crime scene to direct Wallace Schwartz to police headquarters if Mr. Schwartz were to stop at the Fentress house first.)

5:09 a.m. Wallace Schwartz arrived in Poughkeepsie, and at 5:10-5:15 a.m. Wallace Schwartz returned the call to the police, who informed him that Fentress wanted him to appear as his attorney. Schwartz advised the police that he was not a criminal lawyer and would not be able to properly represent the defendant. By that time Wallace Schwartz had decided to recommend Peter L. Maroulis to the defendant, and in the background, while speaking with the police, he heard Fentress, simultaneously and independently, mention the same attorney.

5:30 a.m. Peter L. Maroulis telephoned the police, and instructed them not to question the defendant. They had not; they did not.

6:10 a.m. Attorney Peter L. Maroulis arrived at the City of Poughkeepsie Police Station, and conducted a private interview with Fentress and Wallace Schwartz.

As additional findings of facts, the Court further concludes that:

(1) At no time before the arrest did Wallace Schwartz ever tell Fentress that he was representing him or that he was not representing him in the matter. The conversation, understandably, dealt with more immediate affairs.

(2) Wallace Schwartz never told the police how he wanted them to deal with Fentress regarding questioning, procedures, or the like.

(3) Although Wallace Schwartz never for a moment envisioned himself as being Fentress's attorney of record in this case, Fentress, in speaking to Wallace Schwartz during the 2:10 a.m. phone call, spoke to him as a friend and as an attorney, and the disclosures to Wallace Schwartz are within the attorney-client privilege.

(4) When Enid made the decision to call Fentress at 2:45 a.m., she did so on her own, independently, and, in calling, did not act as the agent of Wallace Schwartz.

(5) Fentress's disclosures to Enid during the 2:45 a.m. conversation, were voluntarily and independently made, without duress, pressure, or exploitation of any kind. Fentress made those disclosures without any knowledge that Enid already knew (through her conversation with Wallace Schwartz) what had occurred, and absent any subjective thoughts that disclosure to Enid was on constraint of or a necessary concommitant of his earlier statements to Wallace Schwartz. These disclosures to Enid were totally attenuated from those earlier disclosures to Wallace Schwartz. Wallace Schwartz never told Fentress that he was going to communicate with Enid. This is a significant omission, supportive of the factual conclusion that Fentress, when responding to Enid's inquiry as to "what happened," removed the conversation from the ambit of any pre-existing attorney-client confidentiality which had been formed at his 2:12 a.m. conversation with Wallace Schwartz. The omission, among other things, eviscerates defendant's claim that for purposes of the attorney-client relationship, Enid was Wallace's agent.

(6) The disclosures by Fentress to Enid Schwartz were not within the scope of the attorney-client privilege.

(7) After failing to reach the rabbi, Enid herself made the decision to call the police, independent of any later conversation with Wallace Schwartz, and, when she called the police, she was not acting as an agent of Wallace Schwartz. If, indeed, she was acting as agent for anyone, in calling the police, it was for Fentress.

(8) During the 2:45 a.m. conversation with Enid, Fentress voluntarily consented that the police be called.

CONCLUSIONS OF LAW

It is useful to begin with a general discussion of the attorney-client privilege, its origins, purposes, and application to the case at bar.

The basis for the preservation of attorney-client confidentiality dates back to at least the Roman era (Radin, The Privilege of Confidential Communication Between Lawyer and Client, 16 Calif. L. Rev. 487). In England, by the time of Elizabeth I, the evidentiary privilege against disclosure appears to have been unquestioned (The Attorney-Client Privilege: Fixed Rules, Balancing and Constitutional Entitlement, 91 Harv. L. Rev. 464). It evolved from a concept assuring the sanctity of the attorney's honor, into a highly functional concern for the encouragement of unrestrained communication by laymen, so that they might, without fear of betrayal, conduct their affairs through the hands of skilled practitioners (The Lawyer-Client Privilege, 56 Northwestern L. Rev. 235). By the last quarter of the 18th Century, this rationale became the exclusive justification for the preservation of confidentiality, although, to be sure, the earlier underpinnings remain, particularly where the attorney's obligation

rests on the ethical duty* as opposed to the privilege against compelled disclosure.

We may take it that if an attorney-client relationship was created, the right to insist on any confidentiality belonged not to Wallace Schwartz, as it once might have, but to Albert Fentress (*Matter of Cunion*, 201 N. Y. 123; *People v. Patrick*, 182 N. Y. 131, 175).

The primary issues to be decided are, therefore, whether the requisites for confidentiality were established, and if so, whether they were waived by Fentress.

Wigmore, as usual, is an apt starting place, and provides the most orderly formulation of the rule (8 Wigmore on Evidence, Sec. 2292, McNaughton Rev. 1961):

(1) Where legal advice of any kind is sought

(2) from a professional legal adviser in his capacity as such,

(3) the communications relating to that purpose,

(4) made in confidence

(5) by the client

(6) are at his instance permanently protected

(7) from disclosure by himself or by the legal adviser,

---

*The "privilege" is codified in CPLR 4503. For the ethical duty to preserve secrets of a client, see Code of Professional Responsibility DR 4-101. The distinction between the ethical duty to keep client's secrets and the reliance upon the more limited privilege to resist compelled disclosure is discussed in *Privileged Communications*, 71 Yale L. J. 1226 at 1238-1239, and in J. F. Chamberlain, *Legal Ethics, Confidentiality and The Case of Robert Garrow's Lawyers*, 25 Buffalo L. Rev. at 216.

(8) except the protection be waived.

II

WALLACE SCHWARTZ'S PROFESSIONAL CAPACITY

If Wallace Schwartz was not being consulted in a professional capacity for legal advice, the inquiry is at an end. Fentress' contention would fail because a prime component of the statutory (and Wigmorian) relationship is lacking (*Matter of Kaplan [Blumenfeld]*, 8 N. Y. 2d 214). The district attorney argues that Wallace Schwartz was predominantly a friend who never handled a criminal case, and was neither retained nor gave any appreciable amount of legal advice to the defendant. To be sure, he "withdrew" in favor of Mr. Maroulis at the earliest time, and made no secret of his discomfort in the unfamiliar surroundings of the criminal law.

It is well settled, however, that the professional relationship may exist in a financial vacuum, and that the absence of a fee or retainer does not alone destroy it (*People v. Arroyave,* N. Y. 2d , January 10, 1980; *Bacon v. Frisbie,* 80 N. Y. 394; *Gage v. Gage,* 13 App. Div. 565).

Under any view, the defendant and Wallace Schwartz were friends. And while there would be no privilege if Wallace Schwartz was acting solely as a friend, abjuring professional involvement (*Kitz v. Buckmaster,* 45 App. Div. 283, mot for lv to app den. 47 App. Div. 633), it may be inferred that the defendant communicated with Wallace Schwartz because he was not only a friend but an attorney, from whom he was seeking support, advice, and guidance. In this, the consultation at bar is unlike the one between a son and his attorney-father (*Matter of A and M,* 61 A. D. 2d 426) in which the father's professional status was obviously and purely incidental. Fentress reached out for Wallace Schwartz, 50 miles away, and he was seeking nothing if not guidance in the aftermath of a homicide,

and disclosure of his suicidal intentions. That Wallace Schwartz was in effect called upon to serve as psychologist, therapist, counselor, and friend, does not derogate from his role as lawyer (Privileged Communications, 71 Yale L. J. 1226 at 1252). While the defendant's announced suicidal intentions seem, on the surface to occasion little in the way of legal advice, they are of supreme importance, for other reasons, discussed below.

Fentress told the police on several occasions that he had an attorney, Wallace Schwartz, and was eagerly awaiting his arrival. It is indicative of his own subjective and articulated belief that he contacted his friend, Wallace Schwartz, qua attorney (*Nichols v. Village Voice, Inc.*, 99 Misc. 2d 822). As we shall see, however, unlike in *Nichols*, Fentress held the actual belief that Wallace Schwartz was his attorney, but did not, and could not, have concluded that their conversation was to be kept confidential in all respects.

III

THE LEGAL ADVICE

Wallace Schwartz, thus consulted as both an attorney and friend, did not, at the relevant time,* "refuse to act" in a legal capacity or strip away his professional role leaving only a bond of friendship. Fentress urges, as he must to fit within Section 4503, that his call was for "legal advice." Ironically, the only "legal advice" which he can identify—and the Court adopts it as such—is the advice that the police must be called, the very advice which Fentress is now trying to disown. He cannot have it both ways.

---

*Wallace Schwartz, three hours later, told the police that he could not handle the case because he was not a criminal lawyer. But this disclaimer was not issued to Fentress at the time of the initial call, when the incriminating utterances were made. People frequently visit attorneys with whom they strike a professional relationship, only to be referred to a specialist. It is not necessary that the attorney actually "accept" employment (*Alexander v. United States*, 138 U.S. 353).

For the reasons expanded upon in Point IV, this Court has factually rejected the defendant's argument that he did not concur in the very advice on which he seeks to rest the relationship itself.

Moreover, Wallace Schwartz's advice was not the least bit unprofessional. Even the most seasoned criminal lawyers often "legally advise" their clients to turn themselves in for reasons which are strategic, if not moral. An experienced criminal practitioner might, of course, refrain from making that suggestion and still be on arguably stable grounds (both legally and ethically, despite the existence of an undetected body*), but he would have to weigh the risk of its ultimate discovery, and the disdain of a jury for any defense interposed by someone who had the cunning to suppress the corpus delicti. Duplicity is not tactically sound "legal advice." What other "legal advice" could Wallace Schwartz have given?

Had Schwartz affirmatively advised Fentress to conceal or dispose of the body, he would have been counselling the commission of a crime (Penal Law 215.40[2], impeding the discovery of evidence; *People v. DeFelice,* 282 App. Div. 514) which involves professional actions beyond those found endurable in *Belge.* They are violative of Code of Professional Responsibility DR 1-102(4) (5), and may thus demolish the attorney-client privilege itself.** According to the Code of Professional Responsibility EC 7-5, "A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor."

**People v. Belge,* 83 Misc. 2d 191, aff'd 50 A. D. 2d 1088, aff'd 41 N. Y. 2d 60; N. Y. State Bar op. #479 (1978).

***The privilege may not be asserted when the communication relates to the commission of a future crime, or to advise the client to suppress or destroy evidence (*United States v. Gordon-Nikkar,* 518 F.

(Continued on next page.)

Wallace Schwartz gave Fentress wholly proper advice, not only moral and ethical grounds, but on the strategic level as well. No defendant can expect to survive the disfavor of a fact finder who learns that the defendant guidefully secreted evidence. Had Wallace Schwartz counselled differently, the defendant might be in a worse position, before a trier of the fact, then he would be now. That is, assuming he were alive, a condition which he may also owe to Wallace Schwartz's and Enid Schwartz's conduct (see Point VI, *infra*).

IV

NON-CONFIDENTIALITY

Not every communication made to a lawyer in his professional capacity is confidential or intended to be so. As a general rule the question of privileged confidentiality depends on the circumstances (*Doheny v. Lacy,* 168 N. Y. 213, 233; *Wallace v. Wallace,* 216 N. Y. 28, 36; *Matter of Kaplan [Blumenfeld],* 8 N. Y. 2d 214; *People v. Belge,* 59 A. D. 2d 307). Fentress's intentions and his reasonable expectations of confidentiality or disclosure, as expressed and inferred from his conversations are of critical importance (see 24 Ohio State L. J., *supra,* at 26). Fentress,

(Continued from previous page.)
2d 972, 975; *United States v. Goldstein,* 456 F. 2d 1006, 1011, cert. denied 416 U. S. 943; Note, The Future Crime or Tort Exception to Communications Privileges, 77 Harv. L. Rev. 730 [1964]), or to conceal wrong doing (*Tierney v. Flower,* 32 A. D. 2d 392; *People ex rel. Vogelstein v. Warden of County Jail,* 150 Misc. 714, 270, aff'd 242 App. Div. 611; See, Tarlow, Witness For The Prosecution, A New Role for Defense Lawyer, J. of Crim. Def., Vol. 1, p. 365, n. 114; *Clark v. State,* 261 S. W. 2d 339, cert. denied 346 U. S. 855 rehearing denied 346 U. S. 905. The same result would follow, of course, if the attorney were to aid in impeding discovery of evidence (*United States v. Weinberg,* 226 F. 2d 161, cert. denied 350 U. S. 933; See, R. A. Sedler and J. J. Simeone, The Realities of Attorney-Client Confidences, 24 Ohio State L. J. No. 1, p. 41). Lastly, there is the actual entrustment of evidence to the lawyer. See, The Right of a Criminal Defense Attorney to Withhold Physical Evidence Received From His Client, 38 U. Chi. L. Rev. 211, 213.

when he spoke to Wallace Schwartz at 2:12 a.m., impaired the killing, and his suicidal intentions. Wallace Schwartz told him, and he agreed, that the police would have to be called. According to testimony of Wallace Schwartz:

> "Al (Fentress) indicated that he would leave the door open for the rabbi, that the rabbi can come over, and that he would wait for the rabbi, and that at that time I, meaning me, could call the police . . . . *I wanted to make sure that Al understood what I intended to do.*"
>
> "Towards the end of the conversation the police were (again) mentioned in relation to his waiting for me with the rabbi. I believe at that time it was Al that mentioned that I could call the police at that time."

The conclusion is inescapable, and the Court has found as a fact, that Fentress did not intend to keep the corpus of the crime from the police. His renunciation of confidentiality (as to the fact of the homicide) appeared again when Enid suggested that the police be called, and Fentress again specifically disavowed any expectation of keeping the fact of the homicide from the police. Enid's testimony confirms it, and the Court has adopted as a fact, the defendant's expectations of non-confidentiality regarding the corpus:

> Q. (By Assistant District Attorney Thomas J. Dolan) What was (defendant's) response to that statement (that the police will have to be called)? A. He would like Rabbi Zimet there waiting until the police came.
>
> Q. So he acknowledged that it was proper for the police to come? A. That's the understanding I got.

> Q. He expected the police to come? A. I don't know what he expected. That's what he *said* to me.
> Q. He wanted the rabbi to wait with him for the police? A. Yes.

While he may have wanted the rabbi there first, that desire relates merely to chronology and does not affect its inevitable disclosure. By suggesting a sequence of events, Fentress did not revoke his plainly stated agreement that the fact of the homicide was to be divulged to the police. The case, in this regard, is similar to *State v. Martin,* 274 N. W. 2d 893.

In *Martin,* defendant telephoned his social worker and told him that he had just killed someone (under South Dakota Law confidential communications to social worker, in a professional context are privileged). The Court held, *inter alia,* that no confidentiality was intended by defendant because:

> There is nothing in the record which would indicate that the conversation was made in confidence or with the expectation of confidentiality. The substance of the conversation would substantiate the lack of confidentiality, or an intent thereof, since Martin advised Lawlor that he understood the need for advising the police before he furnished Lawlor his address.

When Fentress concurred in the decision to call the police, he waived confidentiality of the *corpus.* Both to Wallace Schwartz and Enid Schwartz, he knew that disclosure to the police was inevitable both from his viewpoint and from the advice he received from his attorney, and later, from his friend, Enid Schwartz. His express eschewal of confidentiality is controlling (*Rosseau v. Bleau,* 131 N. Y. 177, 183). "If the communication is made to an attorney with the knowledge and intent that it be disclosed to a third person it is fairly clear that it was

not meant to be kept confidential and it is therefore not privileged." (5 Weinstein, Korn & Miller, Sec. 4503.18, p. 45-142; See, also, *Finn v. Morgan,* 46 A. D. 2d 229, 235).

There is more here than mere waiver by implication (Richardson on Evidence, 10th Ed., Sec. 418).* Here we have the converse, the avowed intention, on the client's part, to have the fact of homicide revealed to the police.

It was not unrealistic of Fentress to adopt that stance. While, theoretically, he could have attempted to secrete the body forever, or to actively impede its recovery, both would involve criminal acts. We cannot assume that he would commit those crimes, when, on the strength of this record, his expressed inclination was to the contrary.

One test is: would he have told Wallace Schwartz of the killing if he knew that the police would have to be called. The answer is clearly yes, on the basis of the hearing testimony.

V

AGENCY AND WAIVER

After the 2:12 a.m. conversation between Fentress and Wallace Schwartz, and the 2:40 a.m. conversation between Wallace Schwartz and Enid, Fentress received a telephone call from Enid at 2:45 a.m. She did not tell Fentress that Wallace Schwartz had related to her any admissions that Fentress made to Wallace Schwartz. She began immediately by asking Fentress what happened, and he then told her that there had been a killing. They both then agreed that the police would have to be

---

*There is no need to go so far as to hold that the client bears the duty of taking precautions to protect the privilege (cf. *In re Grand Jury Investigation [Ocean Transportation]*, F. 2d , 3/28/79, D. C. Cir., 25 CrL 2073). It would, indeed, devitalize the privilege and render it too fragile if the client had to repeatedly preface his statements with admonitions of confidentiality (*Matter of Trotta,* 99 Misc. 2d 278, 280).

summoned (see Point IV, *supra*), with Fentress stating that he wanted her to call Rabbi Zimet.*

At this point, for reasons which are expanded upon below the Court finds that the conversation between Fentress and Enid, in which he divulged the killing, was a communication made independently freely by Fentress to Enid, a friend and teaching colleague whom he had known for ten years. He did not make the disclosure on the belief or expectation that Enid was an extension of Wallace Schwartz, qua attorney, or under the impression that she was Wallace Schwartz's agent for *purposes of any attorney-client* confidentiality.

The Court has found as a fact that Fentress's disclosure to her was not prompted on *constraint* of any previous disclosure that he made to Wallace Schwartz, but was independent of it, causally disconnected, and in response to a question by a friend who did not intimate to him that she was privy to any actual facts regarding his actions (*United States v. Bayer,* 331 U. S. 532, 540; *People v. Tanner,* 30 N. Y. 2d 102, 106; *People v. Jennings,* 33 N. Y. 2d 880). The little that Enid knew—of a highly ambiguous nature—she did not disclose to Fentress and he could not have reasonably believed that she was privy to any *incriminating* facts merely from her inquiry, apprehensive though it was, as to "what happened." When Fentress replied, and told her that he killed someone, no confidentiality existed or was intended by him, and any previous attorney-client privilege which may have been created by

---

*At this conversation Fentress dropped his earlier request for Wallace Schwartz to be there prior to the arrival of the police, and limited his expressed concern for the arrival of the rabbi and the police. For purposes of waiver of confidentiality (see Point IV) it is of no importance. Fentress could have fixed any proposed sequence for the arrival of any number of people, police, or lawyers. As long as he affirmatively acknowledged, as he did, his expectation of the inevitable and imminent arrival of the police, any confidentiality, as to the corpus, was waived, and the Court so finds.

the (2:12 a.m.) call between Fentress and Wallace Schwartz had been broken and attenuated. Thus, the evidence before the grand jury was not the "result" of any breach of attorney-client confidentiality within the meaning of CPLR 4503 even if, *arguendo,* complete confidentiality between Fentress and Wallace Schwartz was intended. This conclusion is confirmed by Fentress's repeated recognition and statements to Enid that the police were to be summoned. Hence, Enid was under no legal or ethical duty to refrain from calling the police. She had not only the defendant's express approval to do so, but her own unilateral and unfettered choice in the matter, just as any person is free to call the police when a friend has confided that he killed someone and is about to kill himself.

Though the first disclosure by Fentress to Wallace Schwartz was not eradicated or eradicable, its existence did not poison or induce the later divulgence to Enid. A repeated disclosure will be either induced by or divorced from the first, depending on circumstances. Here, the Court has found that it was independent, and not derivative, within Section 4503. The independent and longstanding friendship between Fentress and Enid, his concurrence with her in summoning the police, his wish for the presence of a rabbi to be there when the police arrived, and the absence of any exploitation or even mention by Enid of the content of Fentress's first disclosure to Wallace Schwartz, all lead to inexorable factual conclusions that Fentress's revelations to Enid were made on an independent footing, bereft of any nexous (save chronological) with the utterances he made to Wallace Schwartz. Thus, even if Wallace Schwartz had told Enid that Fentress willfully murdered someone, the result would be the same, because nothing Enid said to Fentress amounted to or may be construed as compulsion, exploitation, domination, or inducement, particularly where Fentress was speaking to her as a friend (cf. *United States v.*

Bayer, supra; People v. Jennings, supra; People v. Tanner, supra).

The advice later given by Wallace Schwartz to his mother, Enid, at 2:59 a.m., that she should be discreet in what she tells the police because there "may" be an attorney-client privilege, did not and does not alter the relationship between Fentress and Enid. To the extent that there was an attorney-client relationship between Fentress and Wallace Schwartz, Enid was no part of it, nor was she in any manner acting as her son's agent, qua attorney. After her conversation with Fentress at 2:40 a.m., she was entirely free to call the police on her own for the reasons given. It is hard to conceive of anyone doing otherwise.

The defendant recognizes that the *presence* of an unnecessary third party will destroy confidentiality. *People v. Buchanan,* 145 N. Y. 1, writ den sub nom *In re Buchanan,* 158 U. S. 31. The waiver doctrine, however, is applied not only when a third non-indispensible person is present, but when such a person is let in on the secret before (*Workman v. Boylan Buick, Inc.,* 36 A. D. 2d 978), during *(People v. Buchanan, supra)* or after the attorney-client consultation. Thus, when the client, *after consultation,* reveals the contents of the consultation to someone else a waiver is effectuated (*People v. Hitchman,* 70 A. D. 2d 695). This is not new, and represents the unswerving application of the waiver doctrine on the basis of voluntary disclosures made by clients to third persons after the initial consultation (*People v. Farmer,* 194 N. Y. 251; *Yordan v. Hess,* 13 Johns 492).

As Weinstein, Korn, and Miller observe (Vol. 5, New York Civil Practice, Section 4503.18, p. 45-142, 143):

> "The fact that the client has voluntarily revealed the substance of his communication with his attorney to a third person may be either indicative of the fact that the communication was not confidential when made or that the privilege was subsequently waived."

Enid was not a person whose participation was necessary for furtherance of the professional relationship. Had she been present during the 2:12 a.m. conversation, her role as a friend could not be transmuted into that of an attorney's agent* or be perceived as essential to or in furtherance of the attorney-client conference (*Bauman v. Steingester,* 213 N. Y. 328, 332).

That Fentress later told Enid of the killing, rather than contemporaneously, weakens, rather than strengthens his position. Her initial non-participation, followed by Fentress's repetition of the admission to her puts the disclosure on a more independent basis, and made because of his enduring and self-sustaining friendship with her.

The Court has examined a thorough documentation of the history of the statutory amendments to CPLR Sec. 4503 as prompted by *Lanza v. New York State Joint Legislative Committee,* 3 N. Y. 2d 92 (see, also, W. J. Austin, The Use of Privileged Communications for Impeachment Purposes, New York State Bar Journal, November 1977, p. 564, December 1977, p. 657).

A plain reading of the statute shows that it does not apply to the disclosures by Fentress to Enid Schwartz, a third party and non-employee (non-agent) of an attorney, which were made not only with the knowledge of the "client," but, indeed, directly by him to her. Because the "communication" at issue does not come within the ambit of the definition in the first sentence of CPLR 4503(a), any "evidence" which followed the divulgence could not be "evidence . . . resulting therefrom" within the meaning of the second sentence.

---

*Naturally, the mere fact that Enid and Wallace Schwartz were related does not itself create agency (Anno. 96 A.L.R. 2d 125, Persons Other Than Client or Attorney Affected by, or Included Within, Attorney-Client Privilege, §5) and the Court finds no other evidence to justify any finding of agency.

VI

SUICIDE

The defendant's announced suicidal intentions pervade the case. Wallace Schwartz was burdened with a trilemma. He had just been told of a frightful homicide and an undiscovered victim. Secondly, Fentress said he was about to take a second life, his own. Given the desperation of the call, it would not have been possible for Wallace Schwartz, or anyone else, to determine whether the victim was still alive or beyond all hope. Fentress had mentioned drinking and a sexual mutilation as well. Schwartz could not possibly travel quickly enough to save anyone's life, but he knew that lives were in serious jeopardy at the very least. The implication of Fentress's motion is that Wallace Schwartz somehow broke a confidence by telephoning his parents, who lived moments away from Fentress, who was their friend as well, for the express purposes of complying with Fentress's request that Rabbi Zimet be summoned to the scene, and to avert a suicide.

The ethical oath of secrecy must be measured by common sense. It is one thing to act as did Francis *Belge* and to withhold knowledge of the whereabouts of victim's remains. There, the agonizing silence, held in the name of privilege, was finally pierced to the shock and outrage of many who would substitute pragmatism for ethical abstractionism. At least there it could be said that in hiding bodies behind a privilege, no life was endangered, although the anguish of the victim's family must have been excruciating. Here, Wallace Schwartz was confronted not only with the vexing moral and ethical predicament which faced *Belge,* but with one, and possibly two lives, still hanging, literally, in the balance.

To exalt the oath of silence, in the face of imminent death, would, under these circumstances, be not only

morally reprehensible, but ethically unsound. As Professor Monroe Freedman reminds us, "At one extreme, it seems clear that the lawyer should reveal information necessary to save a life" (10 Crim. L. Bull., No. 10, p. 987). If the ethical duty exists primarily to protect the client's interests, what interest can there be superior to the client's life itself?

The issue was addressed in N. Y. State Bar op. 486 (1978) (New York State Bar Journal, August 1978). Posing the question "May a lawyer disclose his client's expressed intention to commit suicide?" the New York State Bar Association, in interpreting EC 4-2 and DR 4-101(c)(3) answered in the affirmative, despite the repeal of suicide as a crime (see, L. 1919, ch. 214; Former Penal Law Sec. 2301; *Meacham v. NYSMBA,* 120 N. Y. 237, 242). The opinion states:

> . . . There are certain principles of conduct which a lawyer is obligated to uphold by the very nature of his office and its relationship to society. Cf., N. Y. State 479 (1978) with N. Y. State 466 (1977). These principles of conduct are the threads of our social fabric. None is more basic than society's concern for the preservation of human life. A lawyer cannot be unmindful of that concern.
>
> The decriminalization of attempted suicide in this State was not intended to effect any basic change in the underlying common law and statutory policies of deep concern for the preservation of human life and the prevention of suicide. Rather, attempted suicide was decriminalized in this State, as elsewhere, in order to promote the very same ends which the penal law had therefore sought to accomplish. See, Schulman, "Suicide and Suicide Prevention: A Legal Analysis", 54 A.B.A.J. 855 at 856-860 (1968). We find this fact to be determinative: and, it compels us to treat an

unannounced intention to commit suicide in a manner similar to that which would obtain in the case of proposed criminal conduct under DR 4-101(c)(3).

In sum, the lawyer's action, when a client has disclosed an intent to commit suicide, must depend upon the particular circumstances present, taking into account policies respecting the protection of human life and the prevention of suicide. Where the lawyer has reason to believe that the client's disclosure may be a cry for attention or help, the lawyer should make a special effort to give the client sympathetic counseling. Where possible, the lawyer should encourage and assist the client to seek needed help. The lawyer may thus, and generally should, take appropriate action to keep the client from committing suicide and, for this purpose, may reveal the client's suicidal intent to others. Disclosure of client confidences respecting contemplated suicide obtained in the course of the lawyer's representation should not be made, however, unless the lawyer reasonably believes that such disclosure is necessary to prevent the client from taking his life.

The opinion does not speak to the duty or option to disclose the existence of a victim whose life may yet be saved, but it seems equally obvious. In any event, here we have both. Thus, even if the defendant flatly forbade Wallace Schwartz from calling the police, the ethical duty of silence would be of dubious operability. We need not decide the legal consequences of such an interdiction, having rejected the defendant's contention that he did not acquiesce in the call to the police, and having found waiver by repetition to Enid Schwartz.

It seems safe to say, however, that Wallace Schwartz acted with exemplary fidelity to his client, and to his moral

responsibilities to society, by doing as he did, in offering the advice which the defendant patently accepted. He steered the prescribed ethical course fastidiously, as if he had the very words of the opinion before him, by offering his client help, and then by suggesting that the police be called, in order that his life be saved. So far as this Court is concerned, his actions have been vindicated, utterly. Had he acted any differently, he would have blindly and unpardonably converted a valued ethical duty into a caricature, a mockery of justice and life itself.

In conclusion, the Court holds that the indictment is based on legally sufficient and competent evidence within the meaning of CPL 190.65, 210.20, 210.25, and 210.30, and CPLR 4503. Accordingly, the motion to dismiss the indictment is denied.

Lastly, the Court expresses its gratitude to both attorneys for their excellent briefs and presentations.

Dated: February 13, 1980.

ALBERT M. ROSENBLATT,
J. C. C.

Amended Decision of Appellate Division, Dated May 5, 1980.

No. 2568

IN THE MATTER

OF

PETER L. MAROULIS,

Petitioner,

v.

COUNTY COURT OF THE COUNTY OF DUTCHESS and HON. ALBERT M. ROSENBLATT, individually and as a Judge of the Dutchess County Court,

Respondents.

Proceeding, pursuant to Article 78 of the CPLR by petitioner, an attorney, presently defense counsel to one Albert Fentress who is presently a defendant in a criminal action under prosecution in the County Court, Dutchess County, under Indictment No. 168/79; (1) to prohibit the respondent from prosecuting the defendant Albert Fentress, under said indictment; or (2) to dismiss said indictment.

No. 2568-A

Motion by petitoner to stay all proceedings under Indictment No. 168/79, pending determination of the proceeding.

Application denied and proceeding dismissed, without costs.

Motion denied as academic.

HOPKINS, J. P., LAZER, GULOTTA & MARGETT, JJ., concur.

May 5, 1980

Order of Appellate Division, Dated May 5, 1980.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on May 5, 1980.

Hon. James D. Hopkins,
Justice Presiding,
Hon. Leon D. Lazer,
Hon. Frank A. Gulotta,
Hon. Charles Margett,
Associate Justices.

IN THE MATTER

OF

PETER L. MAROULIS,

Petitioner,

v.

COUNTY COURT OF THE COUNTY OF DUTCHESS and HON. ALBERT M. ROSENBLATT, individually and as a Judge of the Dutchess County Court.

Respondents.

A proceeding having been instituted in this court, pursuant to Article 78 of the CPLR, by petitioner, an attorney, presently defense counsel to one Albert Fentress

who is presently a defendant in a criminal action under prosecution in the County Court, Dutchess County, under Indictment No. 168/79: (1) to prohibit the respondent from prosecuting the defendant Albert Fentress, under said indictment; or (2) to dismiss said indictment; and the petitioner having moved to stay all proceedings under Indictment No. 168/79, pending determination of the proceeding;

Now, upon the papers filed in relation to the application and the motion, and the application and motion having been duly submitted and due deliberation having been had thereon, it is

ORDERED that the application is hereby denied and proceeding dismissed, without costs; and it is further

ORDERED that the motion is hereby denied as academic.

Enter:

IRVING M. SELKIN
Clerk of Appellate Division

Decision of the Court of Appeals, Dated June 5, 1980.

2 Mo. No. 615

IN THE MATTER

OF

PETER L. MAROULIS,

Appellant,

vs.

COUNTY COURT OF THE COUNTY OF DUTCHESS and HON. ALBERT M. ROSENBLATT, Individually &c.

Respondents.

Motion for leave to appeal &c. denied.

Indictment.

STATE OF NEW YORK,

COUNTY COURT—DUTCHESS COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK

against

ALBERT FENTRESS

Dated the 21st day of August 1979

THE GRAND JURY OF THE COUNTY OF DUTCHESS, by this Indictment, accuses ALBERT FENTRESS of the crime of MURDER IN THE SECOND DEGREE, A CLASS A-1 FELONY, in violation of Section 125.25, subdivision 1, of the New York State Penal Law, committed as follows:

The said defendant, in the City of Poughkeepsie, County of Dutchess and State of New York, on or about the 20th day of August 1979, with intent to cause the death of another person, caused the death of Paul Masters by shooting him in the head with a firearm.

JOHN R. KING
District Attorney

A True Bill
MARLENE E. GUERCIO
Forelady

Statement of Enid Schwartz, Dated August 20, 1979.

Q. What is your first name? A. Enid Schwartz.

Q. Where do you live? A. 26 Bancroft Road.

Q. Is that in Poughkeepsie? A. Yes.

Q. What is your home telephone number? A. 454-8126.

Q. Did you receive a telephone call this morning, that is, August 20, 1979, from your son, Wallace? A. Yes.

Q. About what time was that? A. It was about 2:40 in the morning.

Q. What conversation did you have with your son at that point? A. He got on, he said he felt terrible about waking me up at that time, but something terrible had happened, that he had gotten a call from Al Fentress and Al Fentress had told him, I don't know if these words are exact, but that as far as I can remember, that Al said he had killed someone in the basement and he was going to kill himself and he wanted to speak to Rabbi Zimet, he wanted Rabbi Zimet to come over to his house. And Wally told this to me, and Wally, of course was all upset and Wally added, he said, that I don't know if he's playing some kind of any joke or if it's real and why I'm calling you is maybe you could find out if it is so.

Q. Did you talk further with Wally at that point? A. No, I said I'd get back to him. I said let me call Al and see, then I'll call you back.

Q. What did you do after your call with Wally? A. I hung up and I immediately, Wally had given me Al's phone number and address and I immediately called Al. Al picked it up immediately like he was right near the phone. His voice was very shakey and he seemed quite distraught and he said, and I told him, I said, Wally called, he's very upset for you, Al, and I just wanted to speak to you and find out what had happened. He said, again, I don't know what the words were, I killed someone, or there's been a killing and I don't know why, I assumed it was a burglar. I don't know why that thought came to my

mind. I said, oh, you mean a burglar, someone tried to break in and you shot him. I said call the police. He said no, I want you to call Rabbi Zimet. I said I don't know if I can even reach him. I said you have to speak to the police about this. He said I will, but I want Rabbi Zimet here while we're waiting. He said would you call Rabbi and I said yes. He said you'll get right back to me and I said yes. Then we hung up. I looked up Rabbi Zimet's number. My husband felt I should call the police immediately, and I said if I could only get the Rabbi as he wanted, I think he'll kill himself, I think I want to do this first. And I did, I called Rabbi Zimet and I didn't get an answer, in fact, I thought I was calling the wrong number and I tried again. When I hung up, I was even afraid to call Al, I didn't know what to tell Al about Rabbi Zimet. I called Wally back to tell him that I couldn't reach Rabbi Zimet and that Dad and I felt we had to call the police then and Wally said yes, of course, and I said that I don't think, it doesn't sound like any joke, it sounds like the truth.

Q. Do you know about what time you called Wally back? A. It was about, I think about three o'clock. And then I hung up and I called the police. I explained that I might sound distraught, but that my son who lives in Westchester had just received a phone call from Al Fentress and that there had been a killing. There again, I don't know what exactly I said if that there was a killing or that he killed somebody, but I said he's going to kill himself and I repeated that he wanted Rabbi Zimet to be there. I said to the police I don't know if you may find it's nothing, but it may be something else and I said don't go with your sirens turned on because I know he has a gun collection and I wouldn't want there to be any shooting. I said he's very distraught and I guess I hung, oh, I told them, I said, oh, I added should we, my husband and I, of all of my children and we have known him for many years. Maybe if he knew familiar faces it would calm any situation and we would be glad to go over with you. He said no,

they would take care of it and if it was necessary for us to come, they would call us, and they said they would call me back as soon as they had something to tell me.

Q. Did you tell the police that when you had spoken with your son that your son told you that Al had called him and did you mention in any way that your son is an attorney? A. No, I mentioned that he had called my son, but I don't remember, I'm almost positive I didn't say anything about being an attorney.

Q. What happened after that? A. Since they had told me they would call me back as soon as they knew something, I waited and I guess about 3:30 the police called and they said, first he asked me questions, he said is he married and I said no, and he said does he have a girlfriend. I said I don't know anything about that and he said could there be anyone in the house. I said I don't know anything about who could be in the house. That was a detective, I think, though, I think he identified himself as a detective, but I think, I know the police called on a separate call and said that they had Al Fentress and there had been a shooting and that was how he had put it, there had been a shooting.

Q. When was it that you first learned that from the police? A. I think it was about 3:30 and they said a detective would get in touch with me at a later point.

Q. You just described two telephone conversations with the police. One in which the police inquired whether there was anyone else present in the house and another in which a police officer, a detective, called you back. Did they both occur at about 3:30? A. I would think so. I'm trying to think of even, I don't think, as I recall that it was in one conversation. I think it was two separate conversations within a short period of each other.

Q. Did you at any point in time relate to the police that your son would be coming up to Poughkeepsie? A. No.

Q. What happened after those telephone conversations with the police? A. At one point, I called them and asked

how he was, how Al was, and if they felt that I should come down with my husband and they said no, not at that time and that conversation ended. That could have been about 4:00 that I called. And at 4:30, I got a call and a detective said, using first names, is Wally coming up and I said yes, he is, and he said Al asked for him to come as his attorney, or as an attorney, I don't remember the exact term, and that was about 4:30.

Q. Did you have any further conversations with the police after 4:30? A.The police called to tell me to go to the police station at 12:00 noon. I called back to see if Wallace was still at the police station so that he would wait for me, but he had left.

Q. Did you have any further conversations with your son regarding conversations with Al Fentress, whether they were by phone or in person? A. Well, yes, after he spoke with you, we sat down and tried to figure out approximate timing, my husband, Wallace and myself.

Q. And Wallace was over at my office just before six in the morning, somewhere around ten minutes of six. What time did Wallace arrive at your house? A. I think a quarter after five.

Q. So that he was in your house for about a half an hour before he came to my office, is that correct? A. Yes.

Q. During that period of time did you discuss your conversations with Al, or did he discuss his conversations with Al? A. I don't think we discussed conversations so much as our disbelief with the situation.

Q. What did Wally say to you when he came into the house? A. As near as I would recall, it was how terrible it was and that he couldn't believe such a thing that in all the years he (tape ends)

Q. What did you understand those words to mean? A. Al, as far as I've known him, I've known him a long time too, always seemed like a gentle person, a very caring person, every parent of a student that he had had the nicest things always to say about him and people, friends of mine, would

say, oh, I hope he's in Al Fentress' history class. He had a way of teaching and making his students so enthused with history, it was quite unbelievable. I liked him very much, I thought he was a great teacher, he was just a very nice person.

Q. When Wallace was in your house between 5:15 in the morning and a quarter of six in the morning, did you have any discussions with him in which the words shooting or killing were used? A. I don't recall those words.

Q. Were the words murder or homocide used? A. No.

Q. Is there anything further that you would like to tell us? A. No.

Q. Thank you very much. That ends the statement of Enid Schwartz.

State of New York
County of Dutchess

Enid Schwartz, being duly sworn, deposes and says:

I have read the foregoing transcript of questions asked by Peter L. Maroulis and answers given by me, consisting of 3 pages, which I gave on August 20, 1979, and I swear that the answers given by me are all true.

ENID SCHWARTZ

Sworn to efore me this
24th day of August, 1979
MARGARET MAROULIS
Notary Public, State of New York
Qualified in Dutchess County
Commission Expires March 30, 1981

Statement of Enid Schwartz, Dated August 21, 1979

Q. Mrs. Schwartz, I've just turned on a tape recorder, and for the purpose of the tape recorder I would like to make note of the fact that today is August 21, 1979, and it's approximately 4:50 P.M. Mrs. Schwartz, you related to me that you went to talk to Assistant District Attorney Tom Dolan today and thereafter, you went before the Grand Jury. I would like you to tell me, if you will, what conversation you had with Mr. Dolan when you first went to his office. A. When I first went to his office we had a discussion together with Officer Gay who received my initial call at about 3:05 August 20th and recounted, I called Al Fentress up and mentioned that I had just gotten a call from Walley who was very upset about what Al had said to him and that I wanted to speak with him. I asked what happend and he either said there's been a shooting or I killed someone, I don't exactly remember which expression he used. I told him just to stay calm and he said he would like to speak to Rabbi Zimet and could I please call him. I said I would and he said could you get back to me right away and I said I would. We hung up and, oh, as I recall, I hung up and called Rabbi Zimet and didn't get an answer and thought I had the wrong number and rechecked it and called again, and again there was no answer and I was afraid to call Al back, thinking that, fearing that he might do some harm to himself. I called my son and told him that I would be in touch with the police. I left out that I told Al we would have to call the police and he said he knew that and he would rather have the Rabbi there waiting with him until they came. Then I called the police, recounted the story to them.

Q. What is it that you told Mr. Dolan in his office that you told the police? A. I got on the phone and I told the police I don't know if there's something for real, or if it's just nothing, but you'd best check, that I had received a call from my son who had spoken with Al Fentress, I think

that's when they asked for his address, that there had been a shooting, or that he had killed someone, I don't know what wording was used and that he wanted to speak to Rabbi Zimet and that I could call him and that we would have to call the police and he agreed and that the Rabbi should be there while he was waiting. And then I told the police I know Al has a gun collection, I guess I was feared, I didn't want any struggle, hurt, you hear these stories. I told them to go in without any alarms on, because that would alarm Al and I asked them if my husband and I should go along too.

Q. What did they say to you about that? A. No, that wasn't necessary, they would get in touch with us after.

Q. Did you have any further conversation with Mr. Dolan in his office, Mrs. Schwartz? A. No, he did ask me, he brought up about the opening, he thought it was, not as he would expected, he thought a lot of, more surprised kind of opening, I guess, what happened, you know, and oh my God, what happened, and I explained that that isn't me, that isn't the way I talk. He further asked about the length of my acquaintanceship with Al, how long we have known him and in what capacity. I told him that our entire family was friendly with him, that after my son married, he was friendly with Dr. and Mrs. Matlin and when Dr. Matlin died, he was a great help to her, helping her in household, you know, things like in the house, a man, where out in the garden or on the roof, things that are hard for a woman to get to. He asked if I had ever thought Al was gay and I said as near as I knew him, I was never given any hint of it. He asked if I had ever seen him with a girl and that I know he was engaged at some point. I guess that's all I can think of.

Q. Did he ask you any questions about me? A. No, he didn't ask any questions about you.

Q. You related to me earlier, before I put the tape recording on, that there was some conversation as to how I came to be selected as the attorney. A. Yes.

Q. Where did that conversation take place, was that in his office, or before the Grand Jury. A. In his office.

Q. What questions did he ask and what answers did you give him? A. He asked at what point Mr. Maroulis was brought in and I stated that at 5:15 when Wally arrive in Poughkeepsie, he called the police at their request, he was told to call when he arrived here, he did, and the officer asked if he was going to come down as Al's attorney and Wally said he does not handle criminal cases and he also told this to Al and just about the same time simultaneously that Al and Wally said, oh, Mr. Maroulis should be called and that's how it happened.

Q. When you were in Mr. Dolan's office, did you inquire about whether or not you could listen to a tape recording of the conversation that you had had with the police? A. I don't know if I had exactly asked for it, when he asked the questions, I said if you play the tape, you will hear exactly what I said at that time and he said that's not necessary, what you say now and what you say in the Grand Jury, that's what's important, what's on the tape is not important, and I think, at another point when he asked another question, I said if you will play the tape, you would hear what I said and, again, he repeated it was not important to hear it again.

Q. Did you have any further conversation with him in his office? A. He asked if I had asked Al what specifically had happened, who was killed and what happened, and I said no, I didn't ask him who was killed and it was as if I was assuming it was a burglary and he said did you ask and he was thinking that I said I might have asked and what did he say, I don't even remember him answering.

Q. You told me earlier before I had the tape on that at some point you told Mr. Dolan that I, or we, or you, will have to call the police. A. Yes.

Q. When did that occur, in his office or the Grand Jury? A. In the Grand Jury. It was both times, I know it was in the Grand Jury, too.

Q. What was that conversation regarding the I, or we, or you? A. It was that the police would have to be notified, I didn't recall whether I said I would have to call the police, or we must call the police, I didn't know the exact wording of it and Al had said I know but I would rather have the Rabbi waiting here when they come.

Q. Just so that I'm clear, it is your recollection that you did not say that Al had a gun or that he was armed? A. No, I did not, I said I know there's a gun collection in his house. I did not say he had a gun or that he was armed, I didn't. I said that I know there's a gun collection in his house.

Q. When you started your conversation with the police, did you give them any indication as to the probability of truthfulness of what you were relating to them, that is, were you sure what you were saying to them was accurate? A. Yes, he reiterated that to me, too. He said I hope because he's a friend, you're not swaying it. I said I'm being very truthful, I said I had spoken with Mr. Maroulis and he told me to be absolutely truthful.

Q. Mrs. Schwartz, when you first told the police, did you indicate to them that they might or might not find that there was a serious circumstance? A. Yes.

Q. What did you say to them in that regard? A. When I opened the conversation, I didn't, I was in such disbelief, I really didn't know if there was anything to be going for and that's how I said it. I said I don't know if this is for real, or for what, maybe you'll find something, maybe you won't. I said but it's best to check.

Q. When you got before the Grand Jury, what questions were you asked and what answers did you give? A. In front of the Grand Jury, I was asked my name, my occupation, how long I had known Al. As far as answers I had said that we had known him from about 1968 or 69. I was asked if we had seen him on social occasions, I said on occasion we had. I was asked immediately about the phone call I had made to Al on August 20th.

Q. You mean the 19th, I take it, Sunday? A. Well, it was the 20th by then.

Q. Oh, yes, early morning, the 20th, okay. A. And then about, you know, calling the police.

Q. What did you respond? A. As far as my call to the police?

Q. Yes. A. I repeated my conversation with the police as it happened, you know, that I

Q. Would you start at the beginning of the conversation and take me through it, now this is what you told the Grand Jury, as to your conversation with the police. A. That I was making this call, I didn't know if it was for real or not for real, but it was best to check on it, that I had received a call from my son and, oh, I know, yes, I guess I did mention . . . they didn't want to know any particulars about it. Oh, and now, I guess I said, this all depended on a previous one that I had received and that I was calling to find out what happened and I said that Al had spoken in a quavering voice and said I . . . there had been a shooting or he had killed somebody, killed someone, and that he wanted to have the Rabbi come over and I said, Al, you'll have to, oh, Mr. Dolan had made a point of saying was I sure it was Mr. Fentress' voice and he said to me, he said have you ever spoken to him on the phone before and I said yes. And then as to my conversation with the police, I told him that I had told Al that we, either I, or you, or we, must call the police and he said, yes, I know, but I want the Rabbi here when they come and he said would you please call him right away.

Q. Call the Rabbi? A. Yes, and I said I would and he said would you get back to me and I said yes I would. I told the police that, hopefully they shouldn't go over with a siren on because I didn't want Al to be further alarmed. I did say I know there's a gun collection, I didn't say he was armed, I did say a gun collection. And I hung up and I tried to reach the Rabbi.

Q. And you were unable to reach him? A. Yes.

Q. Did you have any further questions in the Grand Jury that were . . . ? A. I'm trying to think of any further questions. I don't recall if it was in front of the Grand Jury or in his office, but he asked if I, it must have been in his private office that he asked about my . . . in the Grand Jury. I think that was all.

Q. How long were you in the Grand Jury. A. A short time, I don't think more than fifteen minutes.

Q. If you think of anything else that transpired in the Grand Jury room, would you give me a call and tell me about it? A. Yes.

Q. All right, I'm going to turn this tape off at this point.

State of New York
County of Dutchess

Enid Schwartz, being duly sworn, deposes and says:

I have read the foregoing transcript of questions asked by Peter L. Maroulis and answers given by me, consisting of 4 pages, which I gave on August 21, 1979, and I swear that the answers given by me are all true.

ENID SCHWARTZ

Sworn to before me this
24th day of August, 1979
MARGARET MAROULIS
Notary Public, State of New York
Qualified in Dutchess County
Commission expires March 30, 1981

Statement of Wallace L. Schwartz, Dated August 20, 1979.

Q. What is your full name, sir? A. Wallace L. Schwartz.

Q. Where do you live? A. At 100 C Highpoint Drive, Hartsdale, New York.

Q. Are you attorney admitted to practice in the state of New York? A. Yes, I was admitted to practice in January of 1978.

Q. Do you know Albert Fentress? A. Yes.

Q. How long have you known him? A. I have known him I guess about 12 years. We could figure it exactly because it was when I was in his 9th grade class in high school.

Q. Did you receive a telephone call from him this morning, that is, August 20, 1979? A. Yes.

Q. At what time? A. My wife answered the phone and handed it to me, a few minutes into our conversation, or even less, it was no more than a few minutes into our conversation, I looked at the digital clock by the bedside. The digital clock said 2:17 but my wife keeps the clock five minutes ahead of time, so it was really 2:12 at the time, that was within at least a few minutes of the beginning of the call.

Q. What conversation did you have with Al Fentress at the time? A. Al sounded very upset, spoke in a very low voice, very slowly in much the same manner as he spoke with us this morning. He began by saying that he was going to kill himself, I think he said something to the effect that he had killed somebody else, or he may have said that in response to my question, "why, what was the matter, what happened?" he said someone had been killed, I asked him again what happened and he said they had been drinking, and I said, "then there was an accident?" or something like that, and that you should call the police. He said no, it was something much worse than that, he kept repeating that he was going to kill himself. I told him

that he couldn't do that, we were going to call the police, he told me he was a very sick person, that he wasn't the person that I thought that I knew. He said he couldn't live knowing what he had done. I said if he was sick, then he was going to get help and we could make him better, but that it wasn't going to do anything to kill himself, that he had to call the police. I asked him if he wanted to come see me, or if I should come see him, he said, no, he didn't want to drive down, the drive would be about one hour and fifteen minutes, which he has made on several occasions visiting us, and he knows how long it takes. I asked if he wanted me to come up there, and he said that he couldn't wait that long, that he intended to kill himself. I asked him if there was a friend close by and I was trying to think of the name of a person that we met over at the courthouse who was a fellow teacher and lived right down the street.

Q. Baxter? A. Baxter. And I couldn't think of his name, and several times during the conversation, I said to Al, "what's the name of the shop teacher that lives down the street, he would come right over, and he'll wait there till I get there". I mentioned Dr. Siegel, Dr. Martin Siegel, because he knows him real well. I may have mentioned, I don't think I mentioned the Bucks. I think I'm just thinking of them now because we saw them. Oh, I mentioned the Desings. Jimmy Desing, who was also one of his former students who was college age now, or just past college age, who was also a very good friend of his, and the family had known him, he use to live right up the street, although they no longer do live in the area, are also good friends. I suggested those people and he said, "no, there's no one of my friends, and none of those that I would want to come over here". He said "who would you have come over?" and I felt he was trying to get at something, but I didn't know what he was talking about. I said, "I don't know what you mean, what do you mean 'who would I have come over'?" I think back on it now, I guess he really

wanted me to suggest a name instead of him doing it. But he finally said the name Rabbi Zimmit, who, I guess, Al really has no relation to him at all, other than that many of his students were Jewish and I'm sure he has attended many Bar Mitzvahs or whatever and has heard me talk about Rabbi Zimmit on many occasions. He said he had to square this thing with God, he had to find out what God was going to say about it and that he would wait with Rabbi Zimmit, he would talk to Rabbi Zimmit.

Q. You mean wait for Rabbi Zimmit? A. Yes. I said, "Can I hang up and call Rabbi Zimmit?" he said "yes, I will leave the door open that Rabbi Zimmit could come over and he'll stay with me till you get here, and then you can call the police when you get here." He indicated to me that he didn't want to call the police. The conversation went on, many of these pieces that I'm talking about now were repeated several times, over and over again, and there were times that he would just fade out during the conversation. He would keep saying, "um, um" and when I would finish a question or sentence, many times he wouldn't respond and I had to call his name several times to ask if he was still there, if he was still listening to me, to bring his attention back to what was going on. Towards the beginning when I kept mentioning if it was an accident, and so forth, that he just had to call the police and things would be alright, he mentioned something about a sex crime act, he mentioned it only once during the conversation but he did use that term. He mentioned the body being mutilated, only once during the conversation, but he did say it. We were on the phone until about 2:40 in the morning, I wasn't exact on the call, I was very upset by the time I hung up and many times during the conversation, I was hoping that at some point he was just going to say this is all a joke, but he obviously never did. When I hung up, I was concerned, I really didn't know whether something had really happened, I knew that Al, my first thought was to make sure that Al was at home, and he has chimes on

his mantle that ring out, I kept thinking in my mind, and watching the clock to hear his chimes to really know that he was at home and to verify in my mind that that part of all this was true, and in fact, I heard the chimes and I knew that he was there. When I hung up instead of calling Rabbi Zimmit, I called my parents who lived nearby to him, I felt, I wanted to see what their advice was on this, and whether, if Rabbi Zimmit was to be contacted, they were, he might not even remember who I am if I called in the middle of the night, and he knows my mother very well. My mother said that she would call Al first and I said if it seems to you that this is all real and happening, I said at least we'll find out if it's a joke or not. If it isn't a joke, you'll probably have to send Dad out to either get Rabbi Zimmit or get the police or do something. I indicated to my mother, that he was very distraught, that he said someone had been killed. He also indicated to me, thinking of it during this conversation, that the body, when he said it was mutilated, it was a body in the basement, he also mentioned that to me. I told my mother that it sounded like the real thing, but I wasn't sure. He said he had killed somebody and that he was going to kill himself and that he wouldn't let anyone come over but that he wanted Rabbi Zimmit to come over till I got there, before he called the police or did anything, and if not, he wanted to kill himself. So my mother called him and she'll tell you, but according to the notes that we had, my phone call with her at 2:40 only lasted 4 or 5 minutes at most, so by 2:45 she called him from what she tells me. When she hung up with him she did try to reach Rabbi Zimmit and there was no answer at his house, he normally goes away during August, and he's probably away on vacation. There was no answer so she called me back. That was pretty close as far as I can remember to 3:00 by that time when she called me to say she had talked to Al and she was convinced that something really did happen, that she had tried Zimmit, he wasn't there, and we both said, my father was there in the

background, the police should be called with the idea that, in fact, we said, I told them that they should offer to the police that my father go over with the police so that he didn't kill himself upon seeing police arrive, that he would see somebody that he knew. My mother called the police right after that and said this to them that something happened in the house that he was threatening to kill himself, that they thought one of them should go over with the police. They said, no, no one should come with us. They asked questions about who was in the house. They said they would best be able to handle it by themselves and the police told her they would call back right after they had gotten to him and I guess that was about 3:30 that the police called my folks back and they immediately called me back, it was somewhere around 3:30 or a little after, they called me back to say the police had told my parents that they had Al, that he was alright, that there was, I forget how they said it, that there was somebody, or something in the basement. They didn't indicate that whether the person was dead, or anything like that. They just said that Al was alright, that something had taken place there. Then I told my folks, my folks said the police would be coming over, the police told them they would get back in touch with them or they would be coming over to the house. I said it would take me a few minutes to get dressed and all, that it takes an hour and fifteen minutes, and this was now, 3:35 or so, I said, give me about fifteen minutes to get dressed, and another hour and fifteen minutes, it would be around 5:00 or 5:30. I got dressed and everything and called them back about 10 to 4 just before I was leaving and said I'm dressed and leaving. The police had not yet been in touch with them. Ok, so about 10 to 4 I left my place in Hartsdale. I guess I got to my parents house about 5:15 they said the police had called them and that Al had asked for me. I called up the police station and told them who I was and I was calling about

Fentress. They said I was to come and appear as Al's attorney. I explained that I was not a criminal attorney and Al's rights would not be protected by my being there and I said does Al, I don't even know if I prompted him to say that because I was about to call you on my own and I can't remember if it was with prompting or not that the police officer said to Al, whose voice I could hear in the background, who would you like to represent you? Al had I guess figured out in his own mind, what I told the officer, and he said Peter Maroulis. The officer asked if I would contact you and have you call the police station. We looked up your phone number in the book and that's how I called you at about 5:20, 5:25 at the time I called you. You told me to make notes which we sat at the kitchen table and made notes of what happened and you called me back about 5:35, 5:40 and the rest of the time I was with you.

Q. Now, when we started this tape I asked your name

Name and Address Repeated by Wallace Schwartz.

Q. Your telephone number at home? A. 914 428-1466.

Q. And your an attorney, etc.

Repeated as in Beginning of Tape.

Q. And what is your office phone number? A. 212 421-7200.

Q. Is there anything else you would like to add? A. No.

Q. Thank you.

Q. Wally, there was one other thing you mentioned about giving Al your card. A. Yes, months ago, probably when I first started working there, and once again later on, I had given out my card from work with my phone number on it and so forth and we had talked at times that Al would call me if he ever needed me, that if there was a sale of his house which he had contemplated at times moving to a larger house, I would be doing the closing, so forth, so we had discussed my acting in the capacity as the attorney for him on several occasions.

Q. Was there ever any discussion of his proposal to call you in the event he ever had any trouble? A. Yes.

Q. What was that discussion? A. He just said, it was probably in passing upon giving him the card, that he felt free to call me any time day or night if he ever had any trouble.

Q. How long ago was that? A. I really can't say for sure, but it could have been a few months ago, and it was probably said on more than one occasion.

That Ends the Statement of Wallace Schwartz.

State of New York
County of Dutchess

Wallace Schwartz, being duly sworn, deposes and says:

I have read the foregoing transcript of questions asked by Peter L. Maroulis and answers given by me, consisting of 5 pages, which I gave on August 20, 1979, and I swear that the answers given by me are all true.

WALLACE SCHWARTZ

Sworn to before me this
25th day of August 1979
MARGARET MAROULIS
Notary Public, State of New York
Qualified in Dutchess County
Commission Expires March 30, 1981

Affidavit of Wallace L. Schwartz, Sworn to August 25, 1979.

STATE OF NEW YORK, COUNTY COURT,

DUTCHESS COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK

against

ALBERT FENTRESS

State of New York,
County of Dutchess, ss:

WALLACE L. SCHWARTZ, being duly sworn, deposes and says:

FIRST: I am an attorney at law duly licensed to practice my profession in the courts of the State of New York, having been admitted to the Bar of this state in January of 1978. I reside, together with my wife, at 100 C Highpoint Drive, Hartsdale, New York.

SECOND: At approximately 2:12 A.M. on the morning of August 20, 1979, I received a telephone call from Albert Fentress, whom I know to reside at 216 South Grand Avenue, Poughkeepsie, New York. Mr. Fentress immediately confided to me that he had just killed someone, that he felt he was a very sick person, and that he could not live knowing what he had done. After conversing with my client for a short period of time it became apparent to

me that I should make an immediate journey to the Fentress home in Poughkeepsie (a one hour and fifteen minute journey by automobile) in order to physically consult with him as to the particulars of his problem.

THIRD: A few months ago I had a conversation with Mr. Fentress, gave him my card, and assured him that if he ever had any problems that he could feel free to call me at any time of the night or day. When he called me on August 20, 1979, I knew that he was in need of an attorney and did my best to provide him with the appropriate legal advice.

FOURTH: My client informed me during the course of our telephone conversation that he was contemplating suicide. After a brief conversation on this subject, Mr. Fentress indicated to me that he would like to speak with Rabbi Zimet. I said, "Can I hang up and call Rabbi Zimet?", to which he replied, "Yes, I will leave the door opened that Rabbi Zimet can come over and he'll stay with me till you get here." He told me, however, that he did not want to call the police and that the police should not be called until I got there. He said that he would stay with Rabbi Zimet until I got there and that after I got there, I could call the police.

FIFTH: I assured my client that I would call Rabbi Zimet and then leave immediately for his home in Poughkeepsie. Instead of telephoning Rabbi Zimet, I telephoned my mother and sought her advice as to the feasibility of contacting the Rabbi. I indicated to my mother the sum and substance of Albert Fentress' conversation with me to the effect that he had killed someone.

SIXTH: At approximately 2:45 A.M. on the morning of August 20, 1979, my mother called the residence of Albert Fentress and spoke with him. During the course of that

conversation, she became convinced that my client was involved in some type of tragic incident. She then tried to call Rabbi Zimet. Then she telephoned the City of Poughkeepsie Police Department and requested that they respond to the Fentress residence.

SEVENTH: At 3:35 A.M. I spoke with my mother and she told me that Mr. Fentress had been taken into custody and was all right. I also called my mother at 3:50 A.M. and told her I was now dressed and on my way to Poughkeepsie. I arrived in Poughkeepsie, New York at approximately 5:15 A.M. on the morning in question and proceeded directly to my parents residence at 26 Bancroft Road. My mother informed me that Albert Fentress was in custody at the police station and that he had requested that I proceed immediately to the police station.

EIGHTH: I am not a criminal attorney so that at this time I contacted Peter L. Maroulis for assistance. Mr. Maroulis accompanied me to the City of Poughkeepsie Police Department where we both interviewed Mr. Fentress and later appeared for him at his arraignment. Thereafter, I told Mr. Maroulis I would be withdrawing from the case. I also went to the Dutchess County Jail at 1:29 P.M. and informed Mr. Fentress I was withdrawing from the case. Mr. Maroulis is now the attorney of record.

WALLACE L. SCHWARTZ

Sworn to before me this
25 day of August 1979
MARGARET MAROULIS
Notary Public, State of New York
Qualified in Dutchess County
Commission Expires March 30, 1981

Affidavit of Albert Fentress, Sworn to September 18, 1979.

STATE OF NEW YORK,

COUNTY COURT—DUTCHESS COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK

against

ALBERT FENTRESS

Indictment No. 168/79

State of New York
County of Dutchess ss:

ALBERT FENTRESS, being duly sworn, deposes and says:

1. I am the defendant in this matter. I am thirty-eight (38) years old and reside in Poughkeepsie, New York.

2. I make this affidavit of my own personal knowledge.

3. This affidavit is made in support of my application to the court for an order for the relief requested in the notice of motion.

4. On August 20, 1979, shortly after 2:00 A.M., I called my attorney, Wallace L. Schwartz, at his home in Hartsdale, New York, and sought his advice regarding a serious

legal problem which had just occurred. I made that call from my home at 216 South Grand Avenue, Poughkeepsie, New York. I spoke with him in excess of one-half hour and explained all the facts and circumstances surrounding my problem and he gave me legal advice regarding my problem. Shortly after that telephone conversation terminated, I received a telephone call from Mrs. Enid Schwartz, the mother of my attorney, Wallace L. Schwartz.

Mrs. Schwartz, who resides in Poughkeepsie, New York told me that she had just received a telephone call from her son, Wallace L. Schwartz. She stated that he had related to her the substance of my conversation with him. I could tell by what she said to me that he had indeed accurately related our conversation to her. She knew what I had told Wallace. He had requested that she call me in order to assist with my problem pending his arrival at my home in Poughkeepsie from Hartsdale. I spoke candidly with Mrs. Schwartz regarding the nature and extent of my problem.

Sometime after my conversation with Mrs. Schwartz, I observed a car, with no lights on, going by my house. It was a police car. At that time, I was seated in my living room on a hassock and I could see out the living room window to the street. I was waiting for the arrival of my attorney, Wallace L. Schwartz.

As I sat there, I could see another police car drawing up with its lights out. I then heard the police coming up on my lawn and heard someone call my name. I looked up at the door and two policemen were standing in the vestibule. Another policeman was by the window and he inquired, "Do you have a gun?" I said I did. He said, "Where is it?" I said, "It's on my knee," and he said, "Throw it down." I said, "No, you take it." I told the policeman at the window, "I'm not going to move." He said, "Throw the gun down." I said, "It's on my knee. It's simple. Please just take it. Please just take it." The policeman at the window kept saying, "It's all right. I've got him

covered." I could see that he had a gun on me, but the policemen in the vestibule wouldn't come in. Finally, the officer who was outside the window said. "Mr. Fentress, would you put both hands up on your face?" I did that, and as I did that, one of the officers came in and took the gun off my knee. The police took the pistol and they all came in, fanned out and started searching the house. One of them asked, "What's happened here?" I answered him candidly. After that, one of the policemen who was searching the house went downstairs. He called out, "There's someone down here." Then one of the police said, "There's something I have to do," and he read me my rights. He asked me about a lawyer and I said I had called my lawyer earlier. They asked me if there was anything I wanted to say. I said, "No, not until my lawyer arrives."

After I was taken to the police department, I was asked more questions by the police, even though I had told them on several occasions that I was waiting for my attorney, Wallace L. Schwartz. At that point, I asked them to call attorney Peter L. Maroulis, and a police officer responded, "No, I can't." He said, "Your lawyer's coming and I cannot be a messenger. I can't be running back and forth."

I did not call the police and I did not authorize my attorney or his agent to call the police.

I request that the Court grant the relief requested in the notice of motion.

ALBERT FENTRESS

Sworn to before me this
18th day of September 1979.
MARGARET MAROULIS
Notary Public, State of New York
Qualified in Dutchess County
Commission Expires March 30, 1981

Stipulation, Dated January 25, 1980.

STATE OF NEW YORK, COUNTY COURT,

DUTCHESS COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK

Plaintiff,

against

ALBERT FENTRESS

Defendant.

IT IS HEREBY STIPULATED AND AGREED between counsel, that the following set of facts regarding the arrival of the police (at approximately 3:15 A.M. on August 20, 1979) at the Fentress home, be submitted to the court as part of the record on the motion to dismiss the indictment:

The police cars drove past defendant's home with their lights off and without sirens. They parked and four police proceeded from their parked cars across defendant's lawn to his house.

One police officer went to the rear of the house, two went to the front door and one went to the living room window. There was a light on in defendant's living room. The front door was open and the front screen door was closed.

As Officer Perkins approached the living room window, he could see the defendant seated near the window. As he got closer, he spoke to the defendant and asked him to identify himself. He announced to the other police officers that the defendant was covered. Both the defendant and the police officer could see each other and converse with ease, because the living room window was open. Officer Perkins asked the defendant if he had a gun. The defendant said he had a gun and that it was on his knee. Officer Perkins looked closer and saw that there was a gun on the defendant's knee. Officer Perkins asked the defendant to let the gun fall to the floor. The defendant said "Please come in and take the gun".

At Officer's Perkins' direction, defendant put his hand on his head. Two policemen then entered the living room and removed the defendant's gun from his lap.

Dated: Poughkeepsie, New York
January 25, 1980

PETER L. MAROULIS
Attorney for Defendant

JOHN R. KING, District Attorney
Attorney for Plaintiff
By: THOMAS J. DOLAN

Notice of Defense, Dated June 5, 1980.

STATE OF NEW YORK, COUNTY COURT,

COUNTY OF DUTCHESS.

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

against

ALBERT FENTRESS,

Defendant.

Indictment No. 168/79

SIR:

PLEASE TAKE NOTICE that the defendant, Albert Fentress, intends to rely upon the defense of mental disease or defect pursuant to Section 30.50 of the Penal Law, and to offer proof of such defense at the trial of this action.

Dated: Poughkeepsie, New York
June 5, 1980

Yours, etc.,

PETER L. MAROULIS, ESQ.
Attorney for Defendant
Office and Post Office Address
104 Hooker Avenue
Poughkeepsie, New York 12601
Telephone: (914) 471-6050

To:

Hon. Albert M. Rosenblatt
County Court Judge of Dutchess County
10 Market Street
Poughkeepsie, New York 12601

Thomas J. Dolan, Esq.
Assistant District Attorney of Dutchess County
10 Market Street
Poughkeepsie, New York 12601

Stipulation as to Defense, Dated June 5, 1980.

STATE OF NEW YORK, COUNTY COURT,

DUTCHESS COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

against

ALBERT FENTRESS,

Defendant.

IT IS HEREBY STIPULATED AND AGREED between counsel as follows:

1. The defendant has given timely notice (pursuant to Section 250.10 CPL) that he intends to rely upon a defense of mental disease or defect.

2. The defendant will, forthwith, supply the District Attorney with a copy of the report of Arnold Bucove, M.D. regarding the defense of mental disease or defect.

3. Pending the final determination of the Article 78 proceeding entitled *Maroulis vs. County Court* (which seeks prohibition of the trial of this action or mandamus to dismiss this indictment) all material received by the District Attorney regarding the defense of mental disease

or defect shall be held by him under the seal of the Dutchess County Court and shall not be disclosed to any person, except as shall be necessary for the prosecution to prepare its case. In the event that the Article 78 proceeding shall be determined in a manner which prohibits the prosecution of this action or mandates the dismissal of the indictment herein, the material delivered under the seal of this Court shall be returned to defendant's attorney and all persons in the employ of the District Attorney who have learned of the contents of such material shall be forever barred from disclosing the contents thereof.

4. Nothing in this stipulation shall constitute a waiver of any right asserted on behalf of the defendant in the Article 78 proceeding entitled *Maroulis vs. County Court.*

Dated: Poughkeepsie, New York
June 5, 1980

PETER L. MAROULIS
Attorney for Defendant

JOHN R. KING, District Attorney
Attorney for Plaintiff
By THOMAS J. DOLAN

Supreme Court, U. S.
FILED
JUL 21 1980
MICHAEL RODAK, JR., CLERK

No. 79-2018.

IN THE

Supreme Court of the United States

October Term 1980.

PETER L. MAROULIS,

Petitioner,

v.

COUNTY COURT OF THE COUNTY OF DUTCHESS and HONORABLE ALBERT M. ROSENBLATT, Individually and as a Judge of the Dutchess County Court,

Respondents.

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION.

BRIEF OF RESPONDENT IN OPPOSITION.

JOHN R. KING
District Attorney of Dutchess County, New York
County Courthouse
10 Market Street
Poughkeepsie, N. Y. 12601
(914) 485-9880

BRIDGET R. RAHILLY
Assistant District Attorney
County Courthouse
10 Market Street
Poughkeepsie, N. Y. 12601
(914) 485-9880

Attorneys for Respondent

Table of Contents.

	Page
Statement of the Case	1
Reasons Why the Writ Should be Denied	8
CONCLUSION. The petition for a writ of prohibition should be denied	11

TABLE OF AUTHORITIES.

Page

CASES:

Ex Parte Bakelite Corp., 279 U.S. 438 (1929) 8
Bankers Life Casualty Company v. Holland, 346 U.S. 379 (1953) 8
Black v. United States, 385 U.S. 26 (1966) 10

Ex Parte Fahey, 332 U.S. 258 (1947) 8

In re Grand Jury Investigation of Ocean Transportation, 604 F. 2d 672 (D. C. Cir.), cert. denied, U.S. , 100 S. Ct. 229 (1979) 9

Kerr v. United States District Court for the Northern District of California, 426 U.S. 394 (1976) 8

O'Brien v. United States, 386 U.S. 345 (1967) 10

United States v. Franklin, 598 F. 2d 954 (5th Cir.), cert. denied, U.S. , 100 S. Ct. 147 (1979) 9
United States v. Zarzour, 432 F. 2d 1 (5th Cir. 1970) 10

OTHER AUTHORITIES:

McCormick, Evidence, Second Edition 10

8 Wigmore on Evidence, McNaughton Rev. 1961 ... 9

No. 79-2018.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980.

PETER L. MAROULIS,

Petitioner,

v.

COUNTY COURT OF THE COUNTY OF DUTCHESS and HONORABLE ALBERT M. ROSENBLATT, Individually and as a Judge of the Dutchess County Court,

Respondents.

BRIEF OF RESPONDENT IN OPPOSITION.

Statement of the Case.

Albert Fentress has been indicted for the murder of Paul Masters (*see* Pet. App. 37a)* and is now awaiting trial in the County Court of Dutchess County on that indictment.

By Order, dated June 30, 1980, the New York State Supreme Court Appellate Division, Second Judicial Department, stayed that criminal action pending determination of this proceeding.

---

*(Pet. App.) refers to the appendix to the petition.
(S. Tr.) refers to the stenographic transcript of the November 21, 1979, hearing in the Dutchess County Court.
(S.T.R. [a]) refers to the stenographic transcript of the November 27, 1979, hearing in the Dutchess County Court.

Prior to trial, defendant Fentress sought dismissal of the indictment, contending in part, that it was the product of inadmissible, tainted evidence which had been obtained in violation of the attorney-client privilege, as codified in New York Civil Practice Law and Rules, 4503. Defendant Fentress also argued that this evidence was not competent because it was obtained in violation of his rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution. A pre-trial hearing was held to resolve the factual dispute concerning the circumstances under which the police learned of the homicide.

Wallace Schwartz, an attorney, received a telephone call from his friend and former teacher (Pet. App. 7a) Albert Fentress, who lived in Poughkeepsie (Dutchess County), New York, at approximately 2:00 a.m. on August 20, 1979. When Wallace Schwartz had graduated from law school, he joined a civil firm in New York City; he had given Fentress his card and had told him that he could call any time (Pet. App. 7a). At the time Schwartz received the telephone call, he was in bed in his residence in Hartsdale (Westchester County), New York. Fentress told Schwartz that he was going to kill himself. When asked why, he replied that he killed somebody, that a terrible thing had happened and that Fentress would be unable to square this thing with God. Fentress indicated that this was not an accidental killing; there had been a sexual mutilation (Pet. App. 7a). He appeared to be distressed. Schwartz suggested that Fentress come to his home, but Fentress refused because of the distance between Poughkeepsie and Hartsdale. After suggesting the names of several people who might go to Fentress' home (S. Tr. 96-99), Schwartz ". . . asked him if I could call the Rabbi and have the Rabbi come over . . . would he wait there for me." Fentress indicated that he: ". . . would leave the door open for the Rabbi,—that the Rabbi can come over and that he would wait for the Rabbi, and at that time I, meaning me

[Wallace Schwartz] could call the police" (S. Tr. 99; Pet. App. 7a). At that point, Schwartz told Fentress that he would terminate the conversation and telephone the Rabbi (S. Tr. 96-100) (Albert Fentress was and is not Jewish. The only connection between Fentress and the Rabbi was that they had both been at Wallace Schwartz' wedding [Pet. App. note accompanying text at 8a]).

Fentress and Wallace Schwartz had talked for approximately thirty (30) minutes. During that conversation, Schwartz' only "legal" advice to Fentress was that the police should be called (S. Tr. 158; Pet. App. 8a). Fentress agreed but wanted the Rabbi present when the police arrived (Pet. App. 8a).

Schwartz then telephoned his parents for the purpose of enlisting their aid in contacting the Rabbi (S. Tr. 111-12). Albert Fentress and Enid Schwartz had been friends and teaching colleagues for more than ten years (Pet. App. 6a). Mrs. Schwartz suggested to her son

> . . . that she telephone Al before calling the Rabbi. I [Wallace Schwartz] said that would be a good idea because in doing that we would know for certain that we were dealing with a real situation.

(S. Tr. 111-12.) Although Wallace Schwartz had not mentioned to Fentress that he was going to telephone his mother, at Mrs Schwartz' suggestion, Wallace Schwartz agreed that his mother should call Mr. Fentress in order to verify that Fentress had a problem (Pet. App. 10a).

According to Mrs. Schwartz, during that five minute conversation with her son, Wallace Schwartz seemed to be upset (S. Tr. 14-16). At approximately 2:45 a.m., at the conclusion of the mother/son conversation, Mrs. Schwartz telephoned Mr. Fentress. When she asked what

had happened, he replied ". . . there was a killing or a shooting" (S. Tr. 21; Pet. App. 10a). He asked if she would call Rabbi Zimmet to have him come to the Fentress residence (S. Tr. 22). Mrs. Schwartz suggested that the police be called, and Fentress responded that he would like to have Rabbi Zimmet with him waiting until the police came (S. Tr. 79; Pet. App. 10a). Upon the conclusion of that conversation, Mrs. Schwartz attempted on two occasions, unsuccessfully, to telephonically contact Rabbi Zimmet. She was afraid to inform Fentress of her failure because she thought he might carry out his suicide threat, so she decided to advise the police to protect Fentress' well-being. Mrs. Schwartz telephoned her son Wallace at approximately 3:00 a.m. and he agreed that the police should be called immediately because he, too, was afraid that Fentress might commit suicide (S. Tr. 83; S. Tr. 126-27; Pet. App. 11a).

Wallace Schwartz told his mother to:

> . . . call the police. I indicated to her at that time that I thought, just before she hung up, I said I think that there may be an attorney-client problem here; and that in what you relate to the police, you should indicate that Al Fentress is contemplating suicide, and that something very serious has happened there and you should indicate that somebody has been killed in the house (S. Tr. 126-27; *see* Pet. App. 11a).

In addition to his concern that Fentress was contemplating suicide, Mr. Schwartz was also concerned for the safety of the police officers who might be entering the residence (S. Tr. 127-28).

Wallace Schwartz never notified Fentress of the decision to call the police even though Schwartz' understanding

with Fentress was that the police would not be contacted until after Schwartz arrived at the Fentress home (S. Tr. 179-84).

At approximately 3:00 a.m., Dispatcher, Patrolman Thomas Ghee of the City of Poughkeepsie Police Department, received a telephone call at police headquarters from Enid Schwartz of 28 Bancroft Road in the City of Poughkeepsie. Mrs. Schwartz requested that the police dispatch officers to the home of Albert Fentress at 216 Grand Avenue because there might have been a "killing" or "shooting" at that location. She told the police that she had spoken with Mr. Fentress and that he said that "there . . . had been a killing or a shooting . . . ." She also advised the police that she was fearful that Albert Fentress would harm himself and she apprised the officers of her attempts to contact Rabbi Zimmet because Fentress "wanted him there while he waited for the police." Mrs. Schwartz also told the police not to use their sirens because she wanted no harm to come to Fentress and "if anything was going on" (S. Tr. 35), "she did not want any harm to come to a policeman." She offered to accompany the police and told the officer that Fentress had a gun collection. The police declined Mrs. Schwartz' offer to accompany them; officers were dispatched to the Fentress home (Pet. App. 12a). During her conversation with the police, Mrs. Schwartz made no reference to the fact that her son was an attorney (S. Tr. [a] 24). Indeed, she never mentioned the word attorney (S. Tr. [a] 6).

As a result of Mrs. Schwartz' conversation with Patrolman Ghee at 3:05 a.m., Patrolman Robert Holden, Robert Matushik, Thomas Perkins and Ronald Ross were dispatched to 216 Grand Avenue. As three of the officers approached the front door of the home, it was noted that the door was open, the lights were on inside and Albert Fentress was sitting in the southwest corner of the house

near an open window. Prior to the police entering the residence, Mr. Fentress asked the officers to enter—"come in and take the gun" (S. Tr. 70-74; S. Tr. [a] 59; Pet. App. 12a). He was thereafter approached by the police and disarmed. At approximately 3:19 a.m., Officer Perkins gave the defendant the "Miranda Warnings" at which point Mr. Fentress indicated that he had already contacted his attorney, who lived in Hartsdale, New York (S. Tr. 63; Pet. App. 12a). Shortly after his arrest, while traveling to the police station, Mr. Fentress identified the attorney as Wallace Schwartz (S. Tr. 64; Pet. App. 12a). Between the time Mr. Fentress arrived at police headquarters at approximately 3:40 a.m. until 6:00 a.m., he made several requests concerning the whereabouts of his attorney (S. Tr. 66; S. Tr. [a] 67; Pet. App. 12a-13a).

One of these requests was made to Detective Ira S. Siegel at approximately 4:25 a.m. Pursuant to the defendant's request, Detective Siegel telephoned the Schwartz residence on Bancroft Road in the City of Poughkeepsie and spoke with Mrs. Enid Schwartz. He was told that her son was en route from Westchester County and would arrive in Poughkeepsie at approximately 5:30 a.m. (S. Tr. 92-93; Pet. App. 13a). Upon his arrival in Poughkeepsie, Wallace Schwartz telephoned the police. He spoke with Detective Siegel approximately five to ten minutes after Siegel had telephoned Mrs. Schwartz. Mr. Schwartz told the detective ". . . he didn't feel that he could defend Fentress because he is not a criminal attorney." During this conversation, Mr. Fentress was seated in the room with Detective Siegel. Siegel related to Fentress that Schwartz would not represent him. Mr. Schwartz then inquired if Mr. Fentress had mentioned any other attorney. Mr. Fentress had mentioned the name of Peter L. Maroulis and the detective advised Mr. Schwartz of that information (S. Tr. 102-04; Pet. App. 13a).

Wallace Schwartz suggested that Mr. Maroulis be contacted. He did not intend to personally represent Fentress

in connection with this crime. "I am a real estate attorney. I don't have any background in criminal law" (S. Tr. 139-40; S. Tr. [a] 102). However, prior to the arrest, Mr. Schwartz had not told Fentress that he would or would not be representing him in this matter (Pet. App. 13a).

At 5:30 a.m. on August 20, 1979, Detective Siegel received a telephone call from Peter L. Maroulis, an attorney, instructing him not to speak with Fentress (S. Tr. 104; Pet. App. 13a).

Wallace Schwartz met with Mr. Maroulis and accompanied him to the police station where they both interviewed Fentress at approximately 6:00 a.m. Mr. Schwartz was also present at the arraignment of Fentress in the City Court of the City of Poughkeepsie. At 1:30 that afternoon, at the County Jail, Mr. Schwartz informed Fentress that he would not be handling his criminal case (S. Tr. 142-46). He did this even though he never told Fentress he would represent him in the criminal action (S. Tr. 151).

At the conclusion of the pre-trial hearing, after making findings of fact and conclusions of law, Respondent Rosenblatt denied Fentress' motion to dismiss the indictment (Pet. App. 1a-31a).

Subsequently, attorney Maroulis, on behalf of his client, brought on a proceeding in the New York State Supreme Court Appellate Division, Second Judicial Department seeking to prohibit the Respondents from trying Albert Fentress on this indictment on the ground that the indictment was not based on legally sufficient evidence.[1] The Appellate Division dismissed the pro-

[1]Pursuant to an agreement between New York State Assistant Attorney General Barbara B. Butler and Dutchess County Assistant District Attorney Thomas J. Dolan, the District Attorney of Dutchess County has represented the Respondents in this proceeding.

ceeding and the Court of Appeals of the State of New York denied leave to appeal.

Reasons Why the Writ Should be Denied.

Petitioner is seeking an extraordinary writ to obtain interlocutory review of a pre-trial order in a state criminal proceeding. The Respondents recognize that the issue of whether a breach of confidence by a defendant's own attorney requires the application of an exclusionary rule presents a novel issue (*see* Pet. App. 2A). The Respondents also recognize that this Court has the power and the authority to issue this type of writ (*Ex Parte Fahey,* 332 U.S. 258, 259-60 [1947]), but here, its use is inappropriate.

Petitioner has not established a right to the writ because he has not established that based on the facts developed at the hearing, the County Court lacks jurisdiction to try this Indictment. *Kerr v. United States District Court for the Northern District of California,* 426 U.S. 394, 402 (1976); *Bankers Life Casualty Company v. Holland,* 346 U.S. 379, 383-84 (1953); *Ex Parte Bakelite Corp.,* 279 U.S. 438, 461 (1929).

In the first question which petitioner asks this Court to review, he assumes that there has been a violation of the attorney/client privilege. However, this presumption is in direct conflict with the findings of fact made by Respondent Rosenblatt at the conclusion of the pretrial hearing.

The attorney/client privilege applies:

> *(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6)*

are at his insistence permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.

8 *Wigmore On Evidence,* Section 2292, *McNaughton* Rev. 1961. (Emphasis original.) Although the County Court found that defendant Fentress communicated with attorney Schwartz for the purpose of seeking legal advice (Pet. App. 17A-18A), the only legal advice which he received was that the police should be notified (Pet. App. 18A-20A). Fentress agreed that the police were to be notified (Pet. App. 20A-23A). Therefore, the client Fentress decided that the portion of his attorney/client communication pertaining to the corpus of the crime was not to remain confidential. While hindsight may indicate to the defendant that another course of conduct might have been more beneficial to him, that alone does not demonstrate that there was an unauthorized disclosure of a confidential communication. Since the client did not intend to have the communication remain confidential, the disclosure to the police did not violate the attorney's ethical obligation. *See In re Grand Jury Investigation of Ocean Transportation,* 604 F. 2d 672, 675 (D. C. Cir.), *cert. denied,* U.S. , 100 S. Ct. 229 (1979).

Similarly, when Albert Fentress made his statements to Enid Schwartz concerning the shooting, there was no indication that he intended them to be confidential or to remain confidential. Although Mrs. Schwartz telephoned defendant Fentress shortly after he had spoken with Wallace Schwartz, there was nothing in her inquiry concerning what had happened which indicated that she knew the nature of what had occurred. Albert Fentress made admissions to her. Finally, he also agreed with Mrs. Schwartz that the police should be notified. Thus, he confirmed his intention not to keep the fact of the homicide a secret. *See United States v. Franklin,* 598 F. 2d 954 (5th Cir.), *cert. denied,* U.S. , 100 S. Ct. 147 (1979).

It was also appropriate for the police to be notified because Albert Fentress was threatening to kill himself. Both Enid and Wallace Schwartz were concerned about Fentress's life. Mrs. Schwartz expressed that concern to the police when she notified them. In New York State Bar Opinion 486 (1978) (New York State Bar Journal, August 1978), the question: "May a lawyer disclose his client's expressed intention to commit suicide?" was answered affirmatively. Although suicide is no longer a crime in New York State, the opinion is consistent with the value that society places on human life and the general principle that an attorney may disclose an intent to commit a future crime. *See* generally *McCormick, Evidence, Second Edition,* 199-201.

At page 14 of his petition, petitioner refers to this Court's decisions in *Black v. United States,* 385 U.S. 26 (1966); and *O'Brien v. United States,* 386 U.S. 345 (1967). These cases involved the Government monitoring or intercepting conversations between a criminal defendant and his attorney. Here, however, neither the police nor agents of the police were intruders (*see generally United States v. Zarzour,* 432 F. 2d 1 [5th Cir. 1970]); the police were the passive recipients of information disclosed by a private citizen.

The language of the Sixth Amendment to the United States Constitution does not contain an exclusionary requirement. Although this Court has found that the violation of a defendant's Sixth Amendment right caused by police misconduct may require suppression of evidence, the petitioner has not demonstrated that those rulings should be extended to this situation. The petitioner is effectively seeking to suppress the corpus of a crime. Since the discovery of the homicide cannot be attributed to misconduct on the part of law enforcement officers, the

information concerning the occurrence of the homicide and information flowing from that disclosure should not be suppressed.

At pages 15 and 16 petitioner argues that he will suffer irreparable injury if forced to trial on this indictment. In many respects Albert Fentress is in the same position as any criminal defendant who is required to proceed to trial before obtaining appellate review of an adverse pretrial ruling on his motion to suppress a confession, identification, evidence or physical evidence. The arguments which he presents would generally apply to any defendant in New York State whose pretrial suppression motions are denied and who intends to interpose a defense of insanity. However, since he has not established that the respondent usurped its power by denying the pretrial motion to dismiss the Indictment, he has failed to establish a right to the extraordinary relief requested.

CONCLUSION.

The petition for a writ of prohibition should be denied.

June 17, 1980.

Respectfully submitted,

JOHN R. KING,
District Attorney of Dutchess County,
New York,
BRIDGET R. RAHILLY,
Assistant District Attorney,
Attorneys for Respondent,
County Courthouse,
10 Market Street,
Poughkeepsie, N. Y. 12601
(914) 485-9880.